(13)

No. 01-1375-CFX Title: United States, Petitioner
v.
Navajo Nation

Docketed: March 19, 2002 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Feb 1 2002	Application (01A577) to extend the time to file a petition for a writ of certiorari from February 14, 2002 to March 16, 2002, submitted to The Chief Justice.
	Feb 4 2002	Application (01A577) granted by the Chief Justice extending the time to file until March 15, 2002.
	Mar 15 2002	Petition for writ of certiorari filed. (Response due May 18, 2002)
	Apr 9 2002	Order extending time to file response to petition until May 18, 2002.
	May 3 2002	Brief of respondent Navajo Nation in opposition filed.
	May 7 2002	LODGING consisting of ten bound copies of related material submitted by counsel for the respondent.
	May 14 2002	DISTRIBUTED for Conference of May 30, 2002
	May 22 2002	Reply brief of petitioner United States filed.
	Jun 3 2002	Petition GRANTED. This case is set for oral argument in tandem with No. 01-1067, United States v. White Mountain Apache Tribe. SET FOR ARGUMENT December 2, 2002. **********
	Jul 10 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 8, 2002.
	Aug 7 2002	Order further extending time to file the joint appendix and petitioner's brief on the merits to and including August 19, 2002.
	Aug 19 2002	Joint appendix filed.
	Aug 19 2002	*Joint appendix in two volumes
	Aug 19 2002	Brief of petitioner United States filed.
	Aug 19 2002	Motion of Peabody Coal Company, et al. for leave to file a brief as amici curiae filed.
	Aug 22 2002	LODGING consisting of twenty bound copies of related material submitted by counsel for amici Peabody, et al.
	Aug 28 2002	Order extending time to file respondent's brief on the merits to and including October 9, 2002.
	Aug 30 2002	Motion of respondent Navajo Nation to strike amicus curiae Peabody Coal Company's lodging filed.
	Sep 11 2002	Opposition of amici Peabody, et al. to motion of respondent to strike lodging filed.
	Sep 18 2002	Navajo Nation reply to opposition to motion of Peabody filed.
	Oct 7 2002	Motion of Peabody Coal Company, et al. for leave to file a brief as amici curiae GRANTED.
	Oct 7 2002	Motion of respondent Navajo Nation to strike amicus curiae Peabody Coal Company's lodging GRANTED.
	Oct 9 2002	Brief of respondent Navajo Nation filed.
	Oct 9 2002	Brief amici curiae of Jicarilla Apache Nation and Pueblo of

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No. 01-1375-CFX

Entry	Date	Proceedings and Orders
		Laguna filed.
	Oct 9 2002	Brief amicus curiae of Mississippi Band of Choctaw Indians filed.
	Oct 9 2002	Brief amicus curiae of National Congress of American Indians filed.
	Nov 7 2002	CIRCULATED.
	Nov 12 2002	Reply brief of petitioner United States filed.
	Nov 29 2002	Record filed.
	Dec 2 2002	ARGUED.

Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations thereunder, authorize an Indian Tribe, with the approval of the Secretary of the Interior (Secretary), to lease tribal lands for mining purposes. The question presented is:

Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 263 F.3d 1325. The opinion of the Court of Federal Claims (App., *infra*, 31a-79a) is reported at 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 80a) was entered on August 24, 2001. A timely petition for rehearing was denied on November 16, 2001 (App., *infra*, 80a-81a). On February 4, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to

and including March 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a, states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), and Indian Tucker Act, 28 U.S.C. 1505—are set forth in the appendix. App., *infra*, 86a.

STATEMENT

This case concerns the potential liability of the United States in money damages for breach of trust when the Secretary of the Interior has approved a mineral lease agreed to by an Indian Tribe and a private lessee.

1. The United States, through the Secretary of the Interior (Secretary), regulates the leasing of mineral resources on Indian tribal lands under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a-396g, and regulations thereunder. The IMLA authorizes an Indian Tribe, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes for a term not to exceed 10 years and as long thereafter as minerals are produced in paying quantity. 25 U.S.C. 396a. The IMLA also delegates to the Secretary the authority to promulgate rules and

regulations governing mineral "operations," 25 U.S.C. 396d, and permits the Secretary to authorize other officials in the Indian Service to approve Indian mineral leases, 25 U.S.C. 396e.

The Secretary has promulgated regulations implementing the IMLA. The regulations in effect during the events at issue in this case provided that "Indian tribes * * * may, with the approval of the Secretary * * * or his authorized representative, lease their land for mining purposes." 25 C.F.R. 211.2 (1985). The regulations established minimum royalty rates for minerals subject to leasing, including, for coal, "a royalty of not less than 10 cents per ton of 2,000 pounds of [coal]." 25 C.F.R. 211.15(c) (1985).[1] The regulations also provided that lessees could not assign or transfer a lease without the Secretary's approval, 25 C.F.R. 211.26 (1985), and established various other requirements concerning mineral leases and parties to such leases.

2. The Navajo Nation (Tribe), a federally recognized Indian Tribe, occupies the largest Indian reservation in the United States. The Tribe's Reservation comprises more than 25,000 square miles, and spans parts of northeast Arizona, northwest New Mexico, and southeast Utah. Over the past century, large deposits of minerals—including coal, oil, and gas—have been discovered on the Tribe's reservation lands, which are held for the Tribe in trust by the United States. Each year, the Tribe receives tens of millions of dollars in royalty payments pursuant to Indian mineral leases that it has entered into with private companies in accordance with the IMLA. See C.A. App. A2255-A2262.

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[1] In 1996, the minimum royalty rate on new leases for coal was increased to "12 1/2 percent of the value of production produced and sold from the lease." 25 C.F.R. 211.43(a)(2) (2001). The regulations further state, however, that "[a] lower rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b).

a. Peabody Coal Company (Peabody) mines coal on the Tribe's lands pursuant to leases covered by the IMLA. Lease 8580 was executed by the Tribe and the Sentry Royalty Company (Peabody's predecessor in interest), and was approved by the Secretary in 1964. The lease established a royalty rate of 37.5 cents per ton of coal, but provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary * * * or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. App., *infra*, at 82a. In 1966, Peabody (through Sentry Royalty Company) entered into two other coal leases, Lease 9910 and Lease 5743. Those leases contained somewhat higher royalty rates than Lease 8580, see C.A. App. A2678, but did not contain a provision subjecting those rates to reasonable adjustment by the Secretary.[2]

b. In the 1970s, the Tribe sought to renegotiate its existing mineral leases with its private lessees, including Peabody, to increase the royalty payments generated by those leases. As the 20-year anniversary of Lease 8580 approached, the royalty rate established by that lease of 37.5 cents per ton was "equivalent to about 2% of gross proceeds" on the lease. App., *infra*, 2a. That royalty rate was considerably above the minimum royalty rate (10 cents per ton) established by the IMLA regulations for coal leases subject to approval by the Secretary, 25 C.F.R. 211.15(c) (1985), but at the same time was below the minimum rate (12 1/2 percent of gross proceeds) set by Congress in 1976 for coal mined on

[2] Leases 9910 and 5743 cover coal resources located within a former joint use area shared by the Navajo Nation and the Hopi Tribe. The Navajo and Hopi split the revenues from those leases. See C.A. App. A1988, A2678. Leases 9910 and 5743 paid combined royalties of 6.67 percent for coal sold off the leases and 5.33 percent for coal sold on the leases. *Id.* at A2678.

federal lands not subject to the IMLA. See 30 U.S.C. 207(a); App., *infra*, 38a.

In March 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary and asked him to adjust the royalty rate under Lease 8580, in accordance with the term of that lease allowing a "reasonable adjustment" by the Secretary after 20 years. C.A. App. A375-A376. The Chairman asserted that an increase substantially in excess of 12 1/2 percent was warranted in light of the quality of the coal, but that "simple equity" indicated that the minimum royalty rate should not be less than the 12 1/2 percent provided for under federal coal leases. *Id.* at A375. The Chairman also sought the Secretary's "assistance and support in securing voluntary adjustment" in the royalty rates with respect to leases that did not contain an adjustment clause like Lease 8580's and that, in the Chairman's view, contained rates that were "unfair and inequitable." *Id.* at A375-A376.

In June 1984, the Area Director of the Bureau of Indian Affairs for the Navajo Area Office, acting pursuant to the Tribe's request, adjusted the royalty from 37.5 cents per ton to 20 percent of gross proceeds. He then notified Peabody of the adjustment. App., *infra*, 2a-3a; C.A. App. A438.

c. Peabody appealed the Area Director's decision pursuant to 25 C.F.R. 211.2 (1985), challenging, *inter alia*, the Area Director's failure to consult Peabody before reaching his decision. See C.A. App. A2288-A2315.[3] The appeal was

[3] The Department of the Interior's regulations allowed "any interested party adversely affected by a decision * * * of an Area Director of the Bureau of Indian Affairs not approved by the Secretary before the decision was made" to file an administrative appeal. 25 C.F.R. 2.3(a) (1985). The appellant was required to serve the notice of appeal on any other known interested parties, 25 C.F.R. 2.11 (1985), who had the right to file a response, 25 C.F.R. 2.12 (1985). In this case, Peabody (and the utility companies that used coal produced under the lease) appealed the Area Director's royalty adjustment decision to the Commissioner of Indian

taken under consideration by Acting Assistant Secretary of the Interior for Indian Affairs, John Fritz. Shortly thereafter, the Tribe broke off negotiations with Peabody on the proposed amendments. App., *infra*, 39a-40a.

While its appeal was pending, Peabody wrote to Department of the Interior (DOI) officials, asking them to postpone a decision on its appeal in order to permit the parties to attempt to reach a negotiated settlement with respect to a full range of issues, including the royalty rate adjustment to Lease 8580. C.A. App. A2686. In July 1985, following a meeting with the Tribe, Peabody wrote to Secretary of the Interior Donald Hodel, stating that the Tribe apparently had received word of an imminent decision in the Tribe's favor on the appeal of the Area Director's decision, and had informed Peabody that it was breaking off negotiations until DOI had ruled on the appeal. Peabody asked the Secretary to assume jurisdiction of its appeal and either to postpone a decision to allow for a negotiated settlement or to rule in Peabody's favor. *Id.* at A2688. A copy of that letter was sent to the Tribe. In response, the Tribe wrote to the Secretary, urging him to reject Peabody's request and to decide the appeal in its favor. *Ibid.*; App., *infra*, 40a.

Peabody then retained Stanley Hulett, a former aide and friend of Secretary Hodel, and sought a meeting with the Secretary. The record indicates that Hulett and Peabody representatives met with Secretary Hodel in July 1985. App., *infra*, 40a. On July 17, 1985, Secretary Hodel sent a memorandum to Acting Assistant Secretary Fritz, a draft of which had been provided to the Secretary by Peabody, "suggest[ing]" that he inform the parties "that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fash-

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Affairs. The Tribe filed an answer brief in opposition to those appeals. C.A. App. A477-A483.

ion." *Id.* at 76a. The Secretary's memorandum explained that "[a]ny royalty adjustment which is imposed on the parties without their concurrence will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. *Ibid.* The Secretary assured the Assistant Secretary, however, "that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." *Id.* at 77a.[4]

d. The Tribe "has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results," and at most "admit[s] that 'someone from Washington' had urged a return to the bargaining table." App., *infra*, 43a; see C.A. App. A2370, A2689, A2690-A2691. In late August 1985, the Tribe and Peabody renewed their negotiations. On September 23, 1985, they reached a tentative agreement over a package of amendments not only to Lease 8580, but also to Leases 9910 and 5743. App., *infra*, 42a. The negotiated agreement resolved a broad range of issues concerning the existing lease agreements between the parties.

In particular, "[i]n consideration of the benefits associated with [these lease] amendments," the parties agreed to jointly move to vacate the Area Director's July 1985 decision and, instead, adjust the royalty rate under Lease 8580 from 37.5 cents per ton to 12 1/2 percent of the monthly gross proceeds.

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[4] The court of appeals appears to have believed that Acting Assistant Secretary Fritz had decided Peabody's appeal in favor of the Tribe, but then withdrew that decision in response to the Secretary's July 1985 memorandum. App., *infra*, 3a. Although a draft decision in favor of the Tribe had been prepared, a final decision (which would have required the signature of the Commissioner of Indian Affairs, 25 C.F.R. 2.3, 2.19 (1985)) had not been issued. See *id.* at 40a; C.A. App. A2686-A2687. In any event, the DOI regulations authorized the Secretary "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985).

App., *infra*, 84a-85a. Peabody further agreed to pay royalties at the new 12 1/2 percent rate on all coal mined under the lease since February 1, 1984. *Ibid.* As part of the deal, Peabody also agreed to increase the royalty rates with respect to Leases 9910 and 5743, even though those leases, unlike Lease 8580, did not contain any provision for the adjustment of the royalty rate during the term of the lease. C.A. App. A2678, A2692.

At the same time, Lease 8580 was amended to acknowledge the validity of tribal taxation of coal production, and to recognize the Tribe's agreement to waive certain back tribal taxes. C.A. App. A805-A810. The tax rate was to be capped at 8 percent, which "would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." App., *infra*, 44a.[5] Peabody further agreed to pay the Tribe $1.5 million when the amendments became effective, and $7.5 million when it began mining additional coal agreed to by the parties. C.A. App. A804-A805; see App., *infra*, 43a (The agreement not only adjusted existing royalty rates on the leases, but "also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments.").

e. In August 1987, the Navajo Tribal Council approved the lease amendments. A final agreement was signed by the parties in November 1987. The parties then asked Secretary Hodel to approve their agreement. The Secretary formally approved the lease amendments on December 14, 1987. Shortly thereafter, the Area Director's June 1984 decision

[5] This Court had just upheld the right of the Navajo Nation to impose taxes on lessees under tribal leases. *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195 (1985).

adjusting the royalty rate to 20 percent was vacated. App., *infra*, 45a.

3. In 1993, the Tribe brought suit against the United States in the Court of Federal Claims, alleging that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody and adjusting the royalty rate on Lease 8580 to 12 1/2 percent of gross proceeds constituted a breach of trust and a breach of contract. The Tribe did not seek to invalidate the lease amendments, but instead sought $600 million in damages. On cross-motions for summary judgment, the Court of Federal Claims rejected both the Tribe's breach of trust and breach of contract claims, and granted judgment for the United States. App., *infra*, 31a-79a.

With respect to the claim for breach of trust, the Court of Federal Claims found that the United States had entered into a general fiduciary relationship with the Navajo Nation by virtue of the nature of its relationship with Indian Tribes, and the fact that the United States holds tribal lands in trust. App., *infra*, 48a. Although the court noted that the relationship between Indians and the United States "is not necessarily described by the common law of trusts," the court nevertheless decided to consider at the outset the government's actions against the duties governing a common law trustee. *Ibid.* Applying common law standards, the court concluded that the Secretary had contravened the common law fiduciary duties of care, loyalty, and candor by meeting with Peabody while the company's administrative appeal was pending and not disclosing that meeting to the Tribe. *Id.* at 48a, 52a. The court further observed that, "[w]ere this a court of equitable jurisdiction considering a *private* trust, [the Tribe] might easily qualify for [damages]." *Id.* at 52a (emphasis added).

The court continued, however, that "to succeed in litigation in this Court, [the Tribe] must show that the IMLA

imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages." App., *infra*, 53a. In determining whether the Tribe had made such a showing, the court reviewed the IMLA and its implementing regulations in the light of this Court's decisions in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). See App., *infra*, 54a, 59a-61a.

The court recognized "that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity." App., *infra*, 55a. But after reviewing the IMLA and implementing regulations, the court concluded that the United States' "responsibility as it relates to coal royalties does not rise above a generalized trust obligation," which under the *Mitchell* decisions, it explained, is not sufficient to create a money-mandating duty on the government's part. *Id.* at 66a; see also *id.* at 67a ("[N]either the IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal."). The court further concluded that, although the Tribe's complaint "[a]lleg[ed] breaches of general fiduciary duties, [it] failed to link any breach to a specific money-mandating statutory or regulatory provision." *Id.* at 66a.

The court emphasized that "[the Tribe] cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process." App., *infra*, 67a. Indeed, the court noted that in this case "the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*" between the Tribe and Peabody —*i.e.*, the provision of Lease 8580 allowing the Secretary to adjust the royalty rate after 20 years, *ibid.*—rather than from a statute or regulation. "Even then," the court continued, "the Secretary's only guidance was to be 'reasonable' in revising rates." *Id.* at 67a-68a. The court acknowledged that, although it is not required to do so by statute or regulation, "as a matter of policy, DOI would not approve coal leases with royalties less than those the [United States] would receive for its own coal— * * * 12.5 percent." *Id.* at 68a. But the court noted that "there is no claim by the [Tribe] that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy." *Ibid.*[6]

4. a. A divided panel of the Federal Circuit reversed on the breach of trust claim. App., *infra*, 1a-30a. The court began by discussing this Court's *Mitchell* decisions, see *id.* at 5a-6a, and then its own precedents involving breach of trust claims by Indians, including its recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), petition for cert. pending, No. 01-1067 (filed Jan. 22, 2002). In *White Mountain Apache*, the court noted, "[a]lthough the statute was silent on how the United States was to administer the property," the court had applied the common law of trusts to find a duty on the part of the United States enforceable in a suit for damages, "despite the absence of a specific statute and regulations." App., *infra*, 6a.

The court of appeals then analogized the degree of federal involvement with respect to mineral leasing on Indian lands under the IMLA and its implementing regulations to the degree of federal involvement with respect to forest management on Indian lands, which this Court held in *Mitchell II* gave rise to a fiduciary duty that, if breached, would support a claim for money damages. App., *infra*, 8a; see *id.* at 8a-10a. Pointing to 25 U.S.C. 399 (which, as explained below, is not

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[6] The Court of Federal Claims also rejected the Tribe's breach of contract claim, finding that the Secretary was not a party to the lease, and that the Secretary's authority under the lease to adjust the royalty rate was not a binding contractual obligation to do so. App., *infra*, 69a-75a.

part of the IMLA), the court also concluded that "the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes." App., *infra*, 8a-9a; *id.* at 11a. With that understanding, the court concluded that the Court of Federal Claims had erred in finding that there was no sufficient trust relationship between the United States and the Tribe with respect to coal resources that could give rise to a suit for damages in this case. *Id.* at 11a.

After finding the existence of such a trust relationship, the court of appeals held that the Secretary's actions with respect to Peabody's administrative appeal concerning the adjustment of the royalty rate under Lease 8580—which the court characterized as "suppressing and concealing" the decision of the Assistant Secretary and "thereby favoring Peabody interests to the detriment of Navajo interests," App., *infra*, 11a—violated both the common law duties on which the Court of Federal Claims had relied, as well as what the court of appeals described as a statutory duty "to obtain for the Indians the maximum return for their minerals." *Id.* at 12a. The court did not, however, identify what specific provision of the IMLA or its implementing regulations had imposed such a duty, or had been violated by the Secretary. Then, citing *Mitchell II*, the court concluded that the Tribe was entitled to money damages for breach of the fiduciary duties the court had described. *Ibid.*; see *ibid.* ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of 'damages resulting from a breach of the trust.'") (quoting *Mitchell II*, 463 U.S. at 226). The court remanded for a "determination of damages." *Ibid.*

b. Judge Schall concurred in part and dissented in part. App., *infra*., 13a-30a. Drawing on this Court's *Mitchell* decisions and circuit precedent, he reasoned that it is not enough to show a violation of a general fiduciary relationship stemming from federal involvement in a particular area.

Rather, "to state a claim upon which relief can be granted," Judge Schall reasoned, a Tribe "must show the breach of a specific fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue." *Id.* at 29a-30a; see *id.* at 16a ("[U]nder *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship.").

Judge Schall agreed that the IMLA and implementing regulations create a "general fiduciary relationship" between the United States and the Tribe with respect to mineral leases on Indian lands, but at "this point [he] part[ed] company with the majority." App., *infra*, 25a. In his view, "the only government action in this case that implicated a specific fiduciary responsibility to the [Tribe] was DOI's approval of the Agreement" in 1987. *Id.* at 26a. He explained that, although other government actions "may demonstrate disloyalty to the [Tribe] in a vacuum," the Tribe was required to show that the government breached a specific fiduciary obligation with respect to the agreed package of lease amendments. *Id.* at 28a. Judge Schall concluded that the Secretary had breached such a duty by failing to conduct an economic analysis of the lease agreement, which he found, citing common law principles, was implicit in the Secretary's authority to approve the lease amendments. *Id.* at 27a, 30a.

REASONS FOR GRANTING THE PETITION

The divided court of appeals' decision in this case holds that the United States is liable for up to $600 million in damages for breach of trust by the Secretary's actions in 1985 in requesting the Acting Assistant Secretary to defer a decision on Peabody's administrative appeal concerning a royalty rate adjustment under Lease 8580, without finding that the United States violated any specific fiduciary duty established by the IMLA or regulations thereunder. And the court did so without finding that the Secretary violated

any statutory or regulatory duty in 1987 by approving the package of negotiated lease amendments, which superseded the royalty-adjustment provision in Lease 8580.

The decision of the court of appeals directly contravenes this Court's precedents establishing the predicate necessary to show that the United States may be liable in damages for breach of a trust responsibility owed to an Indian Tribe. *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). The decision in this case, particularly coupled with the court of appeals' recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), in which the United States also has filed a petition for a writ of certiorari (No. 01-1067), demonstrate the need for review by this Court with respect to the proper application of its *Mitchell* decisions, and with respect to the important sovereign immunity principles on which the *Mitchell* decisions rest.

A. This Case Presents A Threshold Immunity Question Of Fundamental Importance

The United States enjoys sovereign immunity from suit for damages except when it has undertaken, by statute or implementing regulation, to subject itself and the public's Treasury to claims for violations of specific duties that such provisions of law have imposed. The central question in this case is whether the United States has waived its sovereign immunity with respect to the breach of fiduciary duty claim that the court of appeals sustained below.

1. "[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and * * * such a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969) (citing *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Congress has consented to be sued on certain claims for money

damages under the Tucker Act and the Indian Tucker Act. 28 U.S.C. 1491(a), 1505. Those statutes, however, are merely jurisdictional. See *Mitchell II*, 463 U.S. at 212-217. They do "not create any substantive right enforceable against the United States for money damages." *Id.* at 216; see *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As a result, in order to state a claim for money damages against the United States that is cognizable under the Tucker Acts, a plaintiff must point to a "substantive right" stemming from some other provision of law—such as an Act of Congress or implementing regulation—that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. The requisite waiver of sovereign immunity exists only "[i]f a claim falls within this category." *Id.* at 218; see *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 431 (1990).

2. This Court's *Mitchell* decisions rest on that foundation. In the underlying *Mitchell* litigation, the Quinault Tribe and numerous individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—which provides for the United States to hold allotted lands "in trust for the sole use and benefit of [Indian allotees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not support a money-damages action against the United States for alleged mismanagement of timber resources on allotted lands. As the Court explained, the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]." *Id.* at 542. "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.*

In *Mitchell II*, the Court considered a different set of statutes and implementing regulations, under which the government itself managed virtually every aspect of Indian timber operations, and held that those provisions could "fairly be interpreted as mandating compensation by the Federal Government" for mismanagement of such resources. 463 U.S. at 228. In so holding, the Court emphasized that those provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222. Distinguishing the situation in *Mitchell I*, the Court stated: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.* at 224.[7]

Together, the *Mitchell* decisions establish important limitations on the liability of the United States in damages for breach of a fiduciary duty owed to an Indian Tribe or Indians.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedents

In finding that the United States is liable in damages in this case for breach of trust, the court of appeals contravened the central teachings of this Court's *Mitchell* decisions.

[7] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the type of comprehensive statutory and regulatory scheme involved in that case—requiring the government to manage trust property for the benefit of the Indians—failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400).

1. In *Mitchell I*, the Court held that the fact that a statute creates a trust relationship between the United States and an Indian Tribe with respect to property is *not* in itself sufficient to give rise to a money-mandating obligation on the part of the United States. 445 U.S. at 542. The Court reached that conclusion even though the statute in *Mitchell I*, the General Allotment Act, explicitly requires the United States to hold land "in trust for *the sole use and benefit of the Indian* to whom such allotment shall have been made." *Id.* at 541 (emphasis added). The Court explained that "[t]he Act does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of allotted lands." *Id.* at 542 (emphasis added); see *id.* at 543.

In the IMLA, the United States has assumed certain fiduciary responsibilities with respect to the leasing of minerals on Indian lands, but that Act "does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of [leased] lands." *Mitchell I*, 445 U.S. at 542 (emphasis added). To the contrary, the key provision of that Act transferred leasing authority from the Secretary *to the Tribes*. It provides that tribal lands "may, with the approval of the Secretary * * *, be leased for mining purposes, *by authority of the tribal council or other authorized spokesmen*." 25 U.S.C. 396a (emphasis added). Moreover, as the Court of Federal Claims explained, that provision squares with an important purpose of the IMLA—"to foster Indian self-determination," an "ideal" that is "directly at odds" with the notion that the Secretary has full "*control* over leasing." App., *infra*, 58a-59a; see *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1112 (1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982) (The IMLA gave "tribal governments

control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary").[8]

To be sure, another purpose of the IMLA is to see that Indian Tribes receive "a profitable source of revenue" from the leasing of mineral resources on their lands. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989). That conclusion is supported by the legislative history of the IMLA, which states in part: "It is not believed that the present law is adequate to give the Indians the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1938). But as this Court admonished in *Cotton Petroleum*, 490 U.S. at 179, that statement cannot be given "talismanic effect." Even when "[r]ead in the broadest terms possible," the reference in the committee report to "greatest return from their property" "suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Ibid.*

The reference in the legislative history thus does not entitle a Tribe to renegotiate a lease—or to sue the United States—any time that it believes in retrospect that it did not receive the greatest possible return for its resources. Nor does it obligate the Secretary to second guess or disapprove leases that already have been negotiated and agreed to by a

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[8] See also *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation* v. *Board of Oil & Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (noting that one of the purposes of the IMLA was "to increase Indian authority in granting leases"). That purpose is promoted by the IMLA. As this Court recognized in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 177, 179 (1989), the legislative history of the IMLA makes clear that the statute was intended to make it easier for Tribes to engage in—and profit from—mineral leasing by eliminating obstacles placed on such leasing that did not apply to non-Indians.

Tribe and a lessee on the ground that, in the Secretary's view, the royalty rate and other conditions agreed to by the parties would not maximize the Tribe's profits, or that an alternative set of lease terms would be more in the best interests of the Tribe. The IMLA authorizes the Tribes to negotiate mineral leases with others. The Act's requirement of approval by the Secretary furnishes a general backstop protection, not a duty on the part of the Secretary independently to determine and impose on the parties the terms that she believes will maximize the return for one side of the negotiated transaction.

Moreover, as discussed above, in *Mitchell I*, the statute explicitly obligated the United States to act for the "*sole* * * * benefit" of the Indians, but the Court nonetheless concluded that it did not give rise to a money-mandating obligation on the part of the United States. 445 U.S. at 541 (emphasis added). In the same vein, to the extent that the IMLA generally obligates the Secretary to act for the benefit of Indian Tribes, or in the interests of Tribes, the existence of such a general fiduciary duty does not in itself authorize a damages action against the United States with respect to every claim that the Secretary erred in some particular way in implementing the IMLA.[9]

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[9] The court of appeals relied on "the interests of the Indians" language in 25 U.S.C. 399 as evidence that the IMLA creates a fiduciary responsibility to manage the mineral resources for the benefit of the Indians. App., *infra*, 11a. But Section 399 is not a part of the IMLA. Section 399 was enacted almost 20 years before the IMLA, and authorized the Secretary to lease certain unallotted Indian lands for mining purposes under terms set by the Secretary, *without* approval by the Tribes. The legislative history to the IMLA specifically notes that the Act was intended to correct Section 399's deficiencies, including with respect to the *lack* of control by Indian Tribes over the leasing of their mineral resources. S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra*, at 2. In any event, even if Section 399 were a part of the IMLA, its reference to the interests of the Indians would not compel the conclusion here, any more than in *Mitchell I*, that

2. Trying to take this case out of the realm of *Mitchell I*, the court of appeals reasoned that here, as in *Mitchell II*, the statutory and regulatory scheme gives the Secretary "control" over the management of the Indian resources at issue, and that the existence of such control gave rise to a money-mandating duty on the part of the United States in managing those resources, including with respect to "*all* appurtenant trustee duties, obligations, and liabilities." App., *infra*, 5a (emphasis added); see *id.* at 8a ("The [IMLA] and its regulations are similar to those governing timber resources that were subject of *Mitchell II*, insofar as federal authority is concerned."). That understanding of *Mitchell II* is flawed on several different levels.

a. First, the degree of control exercised by the Secretary with respect to timber management on Indian lands is much greater than the degree of any control exercised by the Secretary with respect to Indian mineral leases. In *Mitchell II*, this Court went to great lengths to describe the "pervasive" control that the United States has expressly assumed with respect to Indian timber sales. 463 U.S. at 219; see *id.* at 220 ("regulations address[] virtually every aspect of forest management"); *id.* at 222 (statutes establish "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber"); *id.* at 225 (government has "assume[d] * * * elaborate control over forests and property belonging to Indians."); *id.* at 225 n.29 (discussing "pervasive federal control" in this area). As the Court of Federal Claims explained, "the level of management and control that the government has assumed over coal leases under IMLA" does not come close to the level of federal control on which this Court grounded *Mitchell II*. See App., *infra*, 54a; see *id.* at 55a-59a.

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the United States has breached a money-mandating duty owed to the plaintiff Tribe.

b. Second, in *Mitchell II* this Court did not focus on the existence of federal control with respect to Indian resources *vel non*. Instead, in addition to pointing to the existence of a "pervasive" regulatory scheme, the Court emphasized that the government had specifically assumed "fiduciary *management* duties" with respect to Indian resources. 463 U.S. at 218 (emphasis added); see *id.* at 222 ("emphasizing the Secretary of the Interior's management duties"). For example, the statute in *Mitchell II* expressly provided that "[s]ales of timber 'shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs." *Id.* at 209 (citations omitted); see *id.* at 222. In addition, Congress mandated that, "[i]n performing this duty, the Secretary was specifically required to take into account" several different factors, including "the highest and best use of the land" and the "'present and future financial needs of the owner and his heirs." *Ibid.*; see also *id.* at 220-221 (Congress has imposed "*strict*[] duties upon the Government with respect to Indian timber management," including by "expressly direct[ing] that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'") (emphasis added).

Congress has not imposed any comparable "fiduciary management duties" on the Secretary with respect to Indian mineral leases. When the Secretary approves a lease (or an amendment to an existing lease), the IMLA neither mandates that she establish a particular royalty rate or other terms, nor imposes specific standards that the Secretary must assure are satisfied. The regulations that applied when Peabody filed its appeal in 1985 and the Secretary approved the lease amendments in 1987, for example, provided only that the Secretary could not approve a lease with a minimum royalty rate of *less* than "10 cents per ton." 25 C.F.R. 211.15(c) (1985 and 1987). As noted above, the current regulations have increased the minimum royalty rate to 12

1/2 percent of gross proceeds—the rate that applies to coal leases on federal lands—and state that "[a] lower royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (2001). The regulations do not separately refer to the Secretary's approval of a rate that is at least equal to the minimum 12 1/2 percent rate, much less require the Secretary to insist that the parties agree to a higher rate under particular circumstances. That structure of even the current regulations underscores that the United States has not assumed any specific fiduciary management duties with respect to the approval of a lease that contains a royalty rate at least equal to the minimum rate. See 56 Fed. Reg. 58,734, 58,736 (1991) (minimum royalty rate regulation provides "reasonable royalty rates for lessors.").[10]

If Congress or the Secretary, acting pursuant to statute, determines that it is appropriate to adopt additional, or more innovative, management duties with respect to coal leases, the statutes and regulations discussed in *Mitchell II* with respect to timber management underscore that they are capable of doing so.

c. Third, *Mitchell II* establishes that, even when the United States has entered into a money-mandating trust relationship with an Indian Tribe, to recover damages for

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[10] In this case, there is no question that the leases at issue complied with the IMLA's minimum royalty rate. In 1987, the minimum royalty rate for coal leases under the IMLA was 10 cents per ton. 25 C.F.R. 211.15(c) (1987). The original royalty rate on Lease 8580 was 37.5 cents per ton—considerably *higher* than that standard. Following their amendment in 1987, the three leases—each of which has a total royalty rate of 12 1/2 percent—were well above the minimum rate, and also satisfy the new standard that was subsequently promulgated by the Secretary in 1996. 25 C.F.R. 211.43(a)(2) (2001) (minimum royalty rate for open-pit or strip coal leases is 12 1/2 percent of the value of coal produced and sold from the lease).

breach of trust an Indian plaintiff must establish a violation of one of the specific statutes or regulations giving rise to that relationship. See 463 U.S. at 224 (The statutes and regulations governing Indian timber management "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities.*") (emphasis added); *id.* at 219 (To determine whether an Indian Tribe has a damages claim, the Court examines whether the statutes and regulations at issue "can be fairly interpreted as mandating compensation for damages sustained *as a result of a breach of the duties they impose.*") (emphasis added). That causal link was present in *Mitchell II*, where the Indian plaintiffs claimed that the government had breached specific fiduciary duties that it owed to them under the statutes and regulations discussed above in managing the timber resources at issue. See *id.* at 210.

The requisite causal link, however, is missing here. Even assuming (contrary to the considerations discussed above) that the IMLA and its implementing regulations establish the kind of trust relationship that the Court found in *Mitchell II*, the court of appeals did not find, and indeed the Tribe has not even alleged, the breach of any specific duties imposed by the statutes or regulations giving rise to that relationship. See App., *infra*, 66a (In "[a]lleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision."). The Tribe's money damages claim for breach of trust fails for that reason alone.

In finding that the United States had breached money-mandating duties owed to the Tribe, the court of appeals did not object to the Secretary's approval of the lease amendments, or to the fairness of the lease package that the Tribe negotiated and asked the Secretary to approve in 1987. Instead, the court pointed to the "[t]he action of the Secretary in suppressing and concealing the decision of the

Assistant Secretary" on Peabody's administrative appeal concerning a provision in Lease 8580 that was superseded by those amendments. App., *infra*, 11a; see *id.* at 11a-12a. Nothing in the IMLA itself or in the regulations implementing the IMLA imposes any specific duties on the Secretary with respect to his supervision of his subordinates on such appeals. Rather, DOI regulations of general applicability establish a process for appeals from administrative actions by various DOI officials, see 25 C.F.R. Pt. 2 (1985 and 2001), and the procedural standards governing that process are defined by the Administrative Procedure Act (APA) and the DOI regulations, not by the IMLA. The court of appeals did not find that the Secretary's actions violated any provision of the DOI's procedural rules or the APA and, in fact, the DOI rules in place at the time the Secretary acted explicitly reserved to the Secretary all powers conferred upon him by law and authorized him "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985); see note 4, *supra*.[11]

Even if there were a procedural rule or principle that the Secretary violated with respect to Peabody's administrative appeal, that would not justify an action for money damages under the Tucker Act. Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim

[11] The court of appeals was not free to override or supplement the procedural rules adopted by the Secretary with its own view of the proper relationship between the Secretary and a subordinate official concerning an internal agency appeal. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Indeed, the court of appeals seriously misapprehended the constitutional structure of our government in characterizing the decision by a Head of an Executive Department not to allow a draft of a decision of a subordinate officer to go into effect as the improper "suppressing and concealing" (App., *infra*, 11a) of the subordinate's action.

under the Tucker Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Instead, the proper recourse would be an APA action to set aside the Secretary's 1987 decision approving the lease amendments, or to timely seek to challenge or reinstate the administrative proceedings concerning the Area Director's decision to increase the royalty rate under the adjustment clause in Lease 8580, not a claim for money damages against the United States for breach of any trust relationship established pursuant to the IMLA.[12]

3. The court of appeals also erred to the extent that it treated the United States as if it were a private trustee that may be liable in money damages to an Indian Tribe for any breach of the common law duties cited by the court. See App., *infra*, 11a-12a, 12a-13a. As the Court of Federal Claims explained, the violations of the common law duties

[12] To the extent that the court of appeals believed that the Secretary's actions with respect to Peabody's administrative appeal rendered his subsequent approval of the lease amendments a breach of the United States' fiduciary obligations, the court was mistaken. As the Court of Federal Claims noted (App., *infra*, 67a), the Secretary's authority to adjust the royalty rate at issue in this case was "*derive[d] solely from the terms of the lease*" that the Tribe had executed in 1964, not from the IMLA. Moreover, even assuming (contrary to the considerations discussed above) that the IMLA imposed a fiduciary obligation on the Secretary not to approve lease amendments unless they were in the best interest of the Indian mineral owner, the Tribe at a minimum would be required to establish that the Secretary could not reasonably have believed that the overall outcome of the approval decision—the lease amendments themselves—was in the Indian mineral owner's best interest. The Tribe has made no such claim. *Cf. Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 312-313 (1989); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.").

that it found "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Id.* at 52a.

The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, give rise to legally enforceable duties on the part of the United States, much less duties that are enforceable in a suit for money damages. In determining when an alleged breach of those duties may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986); *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). To the extent that the court of appeals' decision puts the United States in the shoes of a private, common law trustee for purposes of determining whether the government has assumed money-mandating obligations to an Indian Tribe, the decision departs significantly from this Court's precedents.[13]

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[13] To the extent that the Federal Circuit based its decision on finding a breach of common law trust duties, rather than specific statutory or regulatory duties assumed by the United States, its decision also parts with prior circuit precedent applying the *Mitchell* principles. For example, in *Brown* v. *United States*, 86 F.3d 1554 (Fed. Cir. 1996), the court distinguished between the existence of a fiduciary relationship and whether a cognizable claim for relief had been stated, and held that, "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail." *Id.* at 1563; see also *Pawnee* v. *United States*, 830 F.2d 187, 191-192 (Fed. Cir. 1987), cert. deneid, 486 U.S. 1032 (1988).

C. The Court Of Appeals' Decision Could Have Serious Adverse Consequences For The Government

The practical implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $600 million. The decision below will encourage the filing of damages claims against the United States for breach of trust with respect to the Secretary's approval of Indian mineral leases with private entities. Indeed, any Indian Tribe that believes, with the benefit of hindsight or due to market corrections, that it could have negotiated a better mineral lease deal may seek to obtain damages from the Secretary for breach of trust in approving such an agreement under the IMLA or, as in this case, even under a separate lease term. At a minimum, such a development will subject the United States to costly litigation over such matters as the market value of lease terms negotiated several—or, as here, many—years ago. The Court of Federal Claims already has applied the decision in this case in holding that the United States may be liable in money damages for alleged mismanagement of resources. See *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001).

In addition, the important and recurring nature of the basic question presented by this case is underscored by the Federal Circuit's recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), petition for cert. pending, No. 01-1067. There, the Federal Circuit held that the United States is accountable in money damages for an alleged breach of trust in connection with the property placed in trust by the Act of March 18, 1960 (1960 Act), Pub. L. No. 86-392, 74 Stat. 8, even though the Tribe did not

allege that the United States had breached a specific statutory or regulatory duty to manage the property for the benefit of the Tribe and, indeed, the 1960 Act explicitly reserved *to the government* the right to use the property for its *own* purposes "for as long as" (74 Stat. 8) it deems necessary. In this case, the Federal Circuit specifically relied upon the fundamentally flawed reasoning of *White Mountain Apache* in finding the breach of a money-mandating obligation, without identifying the violation of any specific statutory or regulatory duty. See App., *infra*, 6a ("Although the statute [in *White Mountain Apache*] was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations.").

Under the Tucker Acts, the Federal Circuit is the only circuit that has jurisdiction to consider claims against the United States for money damages for violation of a statute or implementing regulation. It is therefore critical for this Court to review the Federal Circuit's recent, and marked, departure from the teaching of the *Mitchell* decisions with respect to the necessary predicate that a Tribe must show to bring a damages claim against the United States for breach of fiduciary duty. In addition, because this case and *White Mountain Apache* arise under different statutory schemes, they each present that question in a different light. As a result, granting plenary review in both cases would materially assist the Court in addressing the proper application of the *Mitchell* decisions in a comprehensive manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-5086

NAVAJO NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Aug. 10, 2001

Before: NEWMAN, SCHALL, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge PAULINE NEWMAN. Concurring in part and dissenting in part opinion filed by Circuit Judge SCHALL.

DECISION

PAULINE NEWMAN, Circuit Judge.

The Navajo Nation appeals the decision of the United States Court of Federal Claims, dismissing its complaint against the United States for breach of trust and breach of contract.[1] The court ruled that although the United States had breached its fiduciary obligations to the Navajo Nation, this breach was not actionable because the United States did not have a trust relation-

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[1] *Navajo Nation v. United States*, 46 Fed. Cl. 217 (2000).

ship with the Navajo Nation and monetary relief was not available. However, a trust relationship indeed existed and exists with the Navajo Nation, and monetary damages are an available remedy for breach of this trust.

BACKGROUND

The United States, through the Secretary of the Interior and the Interior Department's Bureau of Indian Affairs (BIA), supervises and regulates the development and sale of mineral resources on Indian reservation lands, pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.*, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, and implementing regulations.

In 1964 the Navajo Nation entered into a lease agreement with the Sentry Royalty Company (predecessor in interest to the Peabody Coal Company) for the mining of coal deposits on Navajo lands. The agreement provided for payment of a royalty not to exceed 37.5 cents per ton, and authorized the Secretary of the Interior or his delegate to readjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. As that anniversary approached, due to increases in the market price of coal the rate of 37.5 cents per ton was equivalent to about 2% of gross proceeds. It is not disputed that this was well below then-prevailing royalty rates.

Negotiations proceeded between the Navajo and Peabody. No agreement was reached, and the Navajo asked the Department of the Interior to resolve the issue, in accordance with statute, and to set the royalty at a fair market rate. The BIA Area Real Property Management Officer issued an Initial Decision to

increase the royalty rate to 20%, based on an analysis by the Bureau of Mines. The BIA's Navajo Area Director adopted this decision, and so notified Peabody. Peabody appealed to the Deputy Assistant Secretary for Indian Affairs John Fritz, acting as both Commissioner of Indian Affairs and the Assistant Secretary of Indian Affairs, an appellate path provided by the regulations. *See* 25 C.F.R. §§ 211.2, 211.3. The Deputy Assistant Secretary for Indian Affairs considered the matter and reached a decision affirming the 20% rate. However, this decision was withdrawn at the instruction of the Secretary of the Interior. The Appendix to the decision of the Court of Federal Claims contains a memorandum from Secretary Hodel to John Fritz, Deputy Assistant Secretary for Indian Affairs, stating "I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." 46 Fed. Cl. at 237. Mr. Fritz complied with this instruction.

The record before the Court of Federal Claims reports numerous contacts during this period, on behalf of Peabody, with Interior officials including the Secretary. The Navajo were not told that a decision on Peabody's appeal had been made in their favor. Facing severe economic pressures, the Navajo eventually agreed to a royalty rate of 12.5%.

It can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest. The Court of Federal Claims found that the government's actions "violated the most fundamental fiduciary duties of care, loyalty and candor." 46 Fed. Cl. at 227. However, the court also held that there was no trust relationship between the

agency and the Navajo with respect to these events, and thus that no monetary relief was available.

DISCUSSION

The Fiduciary Relationship

The legal relationship between the United States and the Indian tribes takes a variety of forms, and in part is that of a fiduciary and its charge. *See, e.g., United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202, 37 L. Ed. 2d 22 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust."); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942) ("this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118, 58 S. Ct. 794, 82 L. Ed. 1213 (1938) ("As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe.")

The fiduciary relationship between the United States and the Indian tribes is manifested in various ways. For example, with respect to Indian reservation lands, precedent recognizes a distinction between the laws whereby the United States has only a limited trust relationship with the Indian tribes who occupy the land, and the laws giving rise to a full fiduciary duty toward the Indians. The difference lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians.

When the United States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the duty of the United States is lessened appropriately.

These relationships and duties were discussed in *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*) and 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*). The Court explained that when the United States is assigned control of the management of Indian resources and the duty to manage those resources, there is created a full fiduciary relationship with respect to that management, including all appurtenant trustee duties, obligations, and liabilities. In *Mitchell I* the Court explained that the United States' role of trustee holding title to reservation land under the General Allotment Act is simply an expedient to avoid state and local burdens, whereas the role of the United States in management of the resources of the land is as a full fiduciary, *see Mitchell II*, implementing the government's statutory obligation to manage these resources entirely for the benefit of the Indians. Thus the Court distinguished the government's holding of "bare trust" title to an Indian land allotment without responsibility to manage the resources thereof, from the government's control and management responsibility of these resources as a fiduciary:

> In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Mitchell II, 463 U.S. at 224, 103 S. Ct. 2961.

This guidance has frequently been applied. In *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996) the issue concerned the commercial leasing of land that had been allotted to Indians. The court explained that the test of the government's fiduciary responsibility is whether "the Secretary, rather than the allottees, has control or supervision over the leasing program." *Id.* at 1561. The court observed that a full fiduciary duty exists even when the government has less than total control of management of the resources, and that participation by the Indians in resource management does not absolve the United States of its responsibility to act in the sole and best interests of the Indians.

In *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), the statute establishing "an enforceable fiduciary relationship between the United States and the Tribe," *id.* at 1383, provided that Fort Apache, which had been a military facility within what later became the Tribe's reservation in Arizona, be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." This court held that the statute established a full fiduciary relationship. Although the statute was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations. This court stated:

> Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee.

White Mountain, 249 F.3d at 1377.

In *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001), the fiduciary breach arose from the government's mismanagement of Indian timber resources. Since the United States exercised "comprehensive control over the management and harvesting of timber on Indian reservations," the statutes and regulations established a fiduciary duty in the government to manage the resources in the interest of the Tribes. The court looked to the common law of trusts to determine the measure of damages for the government's breach of this duty, stating:

> Under trust law generally, a beneficiary is entitled to recover damages for the improper management of the trust's investment assets. In determining the amount of damages for a breach of the trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach.

248 F.3d at 1371. The court recognized its obligation, upon breach of trust, to resolve any uncertainty in the measurement of damages against the trustee. See *id.* ("It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee.")

In *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987) this court held that statutes giving the Department of the Interior power and authority with respect to oil and gas leases on Native American lands imposed fiduciary obligations upon the government and provided a remedy of money damages in the Claims Court for their breach.

The Indian Mineral Leasing Act and its regulations are similar to those governing timber resources that were the subject of Mitchell II, insofar as federal authority is retained. The Mineral Leasing Act starts with the provision that no mining lease may be entered unless approved by the Secretary of the Interior:

> **25 U.S.C. § 396a.** On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(Emphasis added.) The statute and its implementing regulations give the Secretary the final authority on all matters of any significance in the leasing of Indian lands for mineral development. The statute assigns to the Secretary the broad and unqualified obligation to "protect[ ] the interests of the Indians," and includes the power to "perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the

purpose of carrying the provisions of this section into full force and effect." 25 U.S.C. § 399. Thus the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes.

Throughout the statute and its implementing regulations is seen the pervasive control by the United States of the manner in which mineral leases are sought, negotiated, conditioned, and paid, and the pervasive obligation to protect the interests of the Indian tribes. For example, the regulations require the written permission of the Commissioner of Indian Affairs before a Tribe can enter into negotiations for a lease rather than offer the lease in an advertised sale. 25 C.F.R. § 211.2. The regulations state the amount of bond to be secured, 25 C.F.R. § 211.6, and authorize a reduced bond if "the circumstances warrant and the interests of the Indian landowners are fully protected," 25 C.F.R. § 211.6(a). The regulations set forth the corporate information to be furnished to the appropriate officer of the Bureau of Indian Affairs, and state the officer's power to require other information. 25 C.F.R. § 211.7. The regulations control the size of coal leases by limiting them, with certain exceptions, to 2,560 acres, 25 C.F.R. § 211.9; and permit the Secretary to approve leases in excess of the acreage limitations if such approval "is in the interest of the lessor." § 211.9(b)(1). The regulations state that the shape of the leased area must be reasonably compact and conform to the system of public land surveys. 25 C.F.R. § 211.8. The regulations prescribe the term of mineral leases and the conditions of their extension. 25 C.F.R. § 211.10.

The regulations provide that royalties earned under such leases must be deposited in the Treasury "to the credit of the Indians belonging and having tribal rights

on the reservation where the leased land is located." 25 U.S.C. § 399. Royalties are paid to the superintendent "for the benefit of the lessors." 25 C.F.R. § 211.12(a). The regulations set the minimum royalties for various minerals. 25 C.F.R. § 211.15. The regulations require that no mining operations shall begin until the lease is approved by the Secretary of the Interior, and must be conducted "in accordance with the operating regulations promulgated by the Secretary of the Interior." 25 C.F.R. § 211.20. The Secretary may cancel a lease for any violation of the lease terms or regulations, and may do so without the consent of the Indian lessors. 25 C.F.R. § 211.27.

It is quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities. The statute and regulations leave no significant authority in the hands of the Indian tribes whose reservation land contains the minerals, and all procedures, responsibilities, and even details are prescribed by Act of Congress and in the regulations promulgated by the Secretary of the Interior. The statutory purpose is to protect the natural resources of the Indians and manage them in a manner that maximizes their benefit to the Indians. The Court has consistently resolved ambiguity in favor of the Indian tribes. For example, in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) the Court noted that state taxation of royalty interests would frustrate the IMLA's purpose of "ensur[ing] that Indians receive 'the greatest return from their property,'" quoting the legislative history of the IMLA.

The Indian Mineral Leasing Act's history elaborates upon the fiduciary relationship. When the Act was proposed, the Secretary of the Interior urged that the legislation be enacted because "it is not believed that the present law is adequate to give the Indians the greatest return from their property." Senate Report No. 985 at 2 (1937); House Report No. 1872 at 2 (1938). Congress responded to the need to ensure that the Indians' welfare is protected and their natural resources managed to the tribes' maximum benefit by emphasizing the Secretary's fiduciary obligations. For example, the legislative reports explained that now the Secretary would approve mineral leases only when they are "in the interest of the Indians." *Id.* Statute, regulations, and precedent place on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians. The Court of Federal Claims erred in holding that there was no authorization for a trust relationship between the United States and the Navajo Nation as to the coal resources.

Breach of the Fiduciary Relationship

The action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary for Indian Affairs, thereby favoring Peabody interests to the detriment of Navajo interests, was characterized by the Court of Federal Claims as "violat[ing] the most basic common law fiduciary duties owned to the Navajo Nation." 46 Fed. Cl. at 219. As that court explained:

> Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests

> adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

46 Fed. Cl. at 226. In addition to violation of common law fiduciary duties, the Secretary also violated statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo. By suppressing the royalty decision of Interior's Deputy Assistant Secretary for Indian Affairs, the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals. In failing to act in the best interests of the Navajo, the government violated its fiduciary responsibilities. Although the government argued, at the hearing of this appeal, that the Secretary's actions were justified in that they reflected a balance of national interests, it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty.

Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of "damages resulting from a breach of the trust," as confirmed in *Mitchell II*:

> This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.

463 U.S. at 226, 103 S. Ct. 2961. The Court confirmed that "The Court of Claims therefore has jurisdiction over respondents' claims for alleged breaches of trust." *Id.* at 228, 103 S. Ct. 2961. The Court of Federal Claims erred in holding that it was without jurisdiction to grant monetary relief and improperly dismissed the complaint.

CONCLUSION

The United States breached its fiduciary obligations to the Navajo Nation in connection with these coal leases with Peabody. A claim for damages for that breach is within the jurisdiction of the Court of Federal Claims. The dismissal is reversed, and the case is remanded for further proceedings including determination of damages.

REVERSED AND REMANDED.

SCHALL, Circuit Judge, concurring-in-part and dissenting-in-part.

The Tucker Act and the Indian Tucker Act establish the jurisdiction of the United States Court of Federal Claims over certain claims against the government and constitute a waiver of sovereign immunity as to those claims. 28 U.S.C. §§ 1491, 1505 (1994). However, those statutes, by themselves, do not create "any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*") (citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed .2d 607 (1980) ("*Mitchell I*") (discussing the Tucker Act and Indian Tucker Act)). For a claimant to state a claim upon which relief can be

granted, a substantive right for money damages "must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 at 216, 100 S. Ct. 1349 (quoting 28 U.S.C. § 1491). In this case, the Navajo Nation ("Nation") asserts a claim for money damages against the government based upon alleged breaches of the government's trust obligations to the Nation.

I.

The Supreme Court, in *Mitchell I*, addressed the issue of under what circumstances fiduciary obligations are created and breached so as to establish a claim for money damages contemplated by the Tucker Act and Indian Tucker Act. In *Mitchell I*, the Quinault Tribe alleged, under a breach of trust theory, that it was entitled to recover money damages in the United States Court of Claims, one of our predecessor courts, for the government's mismanagement of its timber resources. 445 U.S. at 537, 100 S. Ct. 1349. The Tribe alleged that a trust was established by the General Allotment Act of 1887 (codified at 25 U.S.C. § 331 *et seq.*). However, the Court held that the Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the [g]overnment to manage timber resources." *Id.* at 542, 100 S. Ct. 1349. The Court determined that the Act did "not unambiguously provide that the United States ha[d] taken full fiduciary responsibility as to management of allotted lands," in particular, the management of timber resources on the allotted lands. *Id.* at 542-43, 100 S. Ct. 1349. The Court concluded that the General Allotment Act did not establish that the government had a fiduciary duty to manage the Tribe's forest lands; therefore,

the Tribe's ability to recover money damages for the government's actions had to be found "in some other source than the Act." *Id.* at 546, 100 S. Ct. 1349.

The Supreme Court revisited the Quinault Tribe's claim for money damages in *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, where the Court held that there was a fiduciary relationship between the government and the Tribe. The Court found statutes and regulations that "establish[ed] the 'comprehensive' responsibility of the [government] in managing the harvesting of Indian timber," with "[v]irtually every stage of the process . . . under federal control." *Id.* at 222, 103 S. Ct. 2961 (citations omitted). From these statutes and regulations, the Court determined that "a fiduciary relationship necessarily arises when the [g]overnment assumes such elaborate control over forests and property belonging to Indians." *Id.* at 225, 103 S. Ct. 2961. The Court stated that the very statutes and regulations that create the fiduciary relationship also "define the contours of the United States' fiduciary responsibilities." *Id.* at 224, 103 S. Ct. 2961. The Court concluded that the Court of Claims had jurisdiction over the Tribe's claims that the government had violated its fiduciary obligations in management of the Tribe's timber land. *Id.* at 228, 103 S. Ct. 2961.

This court applied the Court's teachings in *Mitchell I* and *Mitchell II* in *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). In *Pawnee*, the Cheyenne-Arapaho Tribe claimed that the government had breached its fiduciary obligation to receive gas royalties computed at the highest market value for two of the Tribe's oil and gas leases. *Id.* at 188-89. In addressing this claim, we first considered whether there was "any general fiduciary relationship" between the Tribe and the

government. *Id.* at 189. We found such a relationship, noting that the Indian Long-Term Leasing Act, codified at 25 U.S.C. § 396, placed the Secretary of the Interior "at the center of the leasing of Indian mineral lands." *Id.* We also pointed to certain accompanying regulations as evidence of the government's involvement in all aspects of the leasing arrangement. *Id.* at 190. We concluded, based on these statutes and regulations, "that the United States has a general fiduciary obligation toward the Indians with respect to the management of [the] oil and gas leases." *Id.*

We noted, however, that the existence of a general fiduciary relationship "does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trusta claim which must be fully tried in the Claims Court." *Id.* at 191. We looked to the statutes and regulations that established the fiduciary relationship and noted that the Tribe's claim ran counter to the requirements of the governing regulations, which expressly restricted the highest price for a majority of the oil and gas produced on the leased land. *Id.* We also noted that "the fiduciary relationship springs from the statutes and regulations" that define the relationship, and that the Tribe had failed to allege the violation of any specific statute or regulation. *Id.* We concluded that, under *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship, and that the Tribe could not create a "viable fiduciary claim purely by insisting that this court (or the Claims Court) establish different or higher standards" than those established by law. *Id.* at 192. We therefore found that the Tribe had failed to state a proper claim for breach of trust, and affirmed the dismissal of its claim. *Id.*

We revisited *Mitchell I*, *Mitchell II*, and *Pawnee* in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996). Brown, and other Indians, alleged that the government had breached a fiduciary duty imposed by 25 U.S.C. § 415 and 25 C.F.R. part 162[2] by failing either to compel the Indians' lessees to fulfill their reporting and payment responsibilities or to cancel the leases. *Brown*, 86 F.3d at 1557. As we did in *Pawnee*, we first looked to see if a fiduciary relationship existed between the Indians and the government with respect to the leased properties. *Id.* at 1559-61. We noted that, under *Mitchell II*, the test for determining whether there was such a relationship was whether the government "takes on or has control or supervision over the tribal monies or properties" that are at issue. *Id.* at 1560 (quoting *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961). We termed this the "control or supervision test" and noted that nearly complete government management was not necessary to create a fiduciary relationship. *Id.* at 1560-61. Applying these standards, we found that the government did control the Indians' leasing program enough to created an enforceable fiduciary duty. *Id.* at 1561-62. This established a general fiduciary duty, but we noted that the Indians still needed to allege a breach of a specific statutory requirement or regulation to sustain a money claim against the government. *Id.* at 1563.

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[2] Section 415 provides that Indian lands may be leased by those tribes or individuals who own them with the approval of the Secretary of the Interior. 25 U.S.C. § 415. Section 415 also indicates that such leases are made under the terms and regulations established by the Secretary, which include those regulations found in 25 C.F.R. part 162. 25 U.S.C. § 415.

We reiterated that the statutes and regulations that create the general fiduciary relationship define the scope and extent of the fiduciary relationship. *Id.* We concluded that, on the record before us, it was not clear that the Indians had "alleged the breach of a specific duty that the regulations squarely place on the [government]." *Id.* Accordingly, we remanded the case for the trial court to determine whether the Indians "alleged the breach of a specific duty that the regulations squarely place[d] on the [government]." *Id.*

Recently, in *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages. First, we determined whether there was a fiduciary relationship between the Tribe and the government regarding buildings and land at Fort Apache, which is within the borders of the Tribe's reservation in Arizona. *Id.* at 1376-77. We found such a relationship existed, based on a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960), to the extent that the government controlled and used the buildings and land at Fort Apache. *Id.* at 1373-77. Then, we determined the government's obligations under this fiduciary relationship, first looking to the common law of trusts to define the nature of the government's obligations. *Id.* at 1377-80. We found that general principles of trust law required the government to use "reasonable care and skill" to preserve the buildings and lands at the fort with respect to which the government had a fiduciary duty to the Tribe. *Id.* at 1379 (citations omitted). We stated: "[I]n each case, we must . . . examine the particular statute, treaty, 'or other fundamental document,' that

creates the trust relationship in order to determine the nature of the relationship and whether the general law of trust has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations." *Id.* at 1380 (citations omitted). We concluded that the Tribe had stated a proper claim for money damages, but pointed out that just because there was a general fiduciary relationship did not mean that every claim by the Tribe was meritorious. *Id.* at 1383 (citing *Pawnee*, 830 F.2d at 191).

With the legal framework established, I now turn to the facts of this case.

II.

In 1964, the Nation entered into Lease 8580 (the "1964 Lease") with Sentry Royalty Company, the predecessor in interest of Peabody Coal Company ("Peabody"), for the mining of coal on the Nation's land at a royalty rate of not more than 37.5 cents/ton. Article VI of the 1964 Lease provides as follows:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In 1984, after negotiations between the Nation and Peabody proved unproductive, the Nation requested, under Article VI, that the Bureau of Indian Affairs ("BIA") raise the royalty rate. BIA, which is part of the Department of the Interior ("DOI"), initially determined that the rate should be raised to 20% of the gross value of the coal mined. Peabody appealed that decision to the Commissioner of Indian Affairs in the DOI, pursuant to the procedures outlined in 25 C.F.R. part 2. Although the official handling the appeal was prepared to issue a decision affirming the 20% royalty rate, then-Secretary of the Interior Donald Hodel requested that release of the decision be delayed. Consequently, both Peabody and the Nation were informed by DOI that a decision on the appeal was not imminent and that they should try to negotiate. Unbeknownst to the Nation, prior to acting on the matter, Secretary Hodel had met with representatives of Peabody who had asked the Secretary to delay the release of DOI's decision.

Peabody and the Nation resumed negotiations, and in 1987, an agreement was reached with respect to renegotiation of the 1964 Lease (the "Agreement"). In addition to amending the lease by raising the royalty rate to 12.5%, the Agreement also addressed other matters, including confirming the Nation's ability to tax Peabody, amending two other leases by raising their royalty rates to 12.5%, adding provisions for future royalty adjustments, establishing a tribal scholarship fund, and requiring the payment by Peabody of certain back royalties, bonuses, and water payments. The Agreement was submitted to DOI for review, and DOI formally approved the Agreement on December 14, 1987.

The Nation filed suit against the government in the Court of Federal Claims on December 14, 1993. The Nation charged that the government had breached its fiduciary duties to the Nation, based on Secretary Hodel's ex parte communications with Peabody, DOI's alleged failure to properly oversee negotiations between Peabody and the Nation, and DOI's final approval of the Agreement, which only raised the 1964 Lease's royalty rate to 12.5%, instead of 20%. The Nation also alleged that the government had breached contractual obligations under Article VI of the 1964 Lease by approving the Agreement. Both the government and the Nation moved for summary judgment on these claims.[3]

The Court of Federal Claims first rejected the government's contention that the Nation's claims were time-barred. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 224-25 (2000). The court then discussed the Nation's breach of trust claim, first looking at the claim under general trust principles. Id. at 226-27. The court concluded that the government's ex parte communications with Peabody and its following actions during the royalty adjustment proceedings violated the "most fundamental fiduciary duties of care, loyalty and candor." *Id.* at 227. The court noted, however, that in order for the Nation to succeed on its money claim against the government, it had to show that some statute, treaty, regulation, or other source of law imposed specific fiduciary obligations on the government and

[3] The government acknowledges that the Court of Federal Claims had jurisdiction over the Nation's claims, and that it thus was proper for the court to reach the merits of those claims and entertain motions for summary judgment.

that the government had violated those fiduciary obligations. *Id.* at 227-28.

The court first addressed whether the government had a general fiduciary obligation with regard to coal leases on Indian land, focusing on the amount of management and control the government assumed over such leases. *Id.* at 228. In that regard, the court considered the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (1938) (codified at 25 U.S.C. §§ 396a-396g) ("IMLA"), and the accompanying regulations, 25 C.F.R. part 211 (1985). *Navajo Nation*, 46 Fed. Cl. at 228-30. The court determined that, while the level of management and control exercised by the government over oil and gas leases may be enough to establish a fiduciary obligation, the government's level of control over coal leases, and in particular coal royalties, is not enough to "rise above a generalized trust obligation." *Id.* at 231-33. In addition, the court concluded that even if a fiduciary obligation does exist, the Nation failed to "link any breach [it alleged] to a specific money-mandating statutory or regulatory provision." *Id.* at 233-34.

The court also found that the government owed no contractual obligation toward the Nation under the 1964 Lease. *Id.* at 234. The court pointed out that the government was not a party to the lease, and that no consideration had passed to the government under the 1964 Lease from either the Nation or Peabody. *Id.* at 234-35. Finally, the court dismissed the Nation's claim that there was an implied-in-fact contract between the government and the Nation with respect to the revision of the royalty rate of the 1964 Lease because there was no intent to contract by the government, no consideration to the government, and no clear offer and acceptance by the government.[4] *Id.* at 236. Based on its findings, the Court of Federal Claims granted the government's motion for summary judgment and dismissed all of the Nation's claims. *Id.*

III.

On appeal, the Nation argues that the government has general fiduciary obligations to it with respect to coal leases involving Indian land, and that, in this case, the government breached those obligations. Specifically, the Nation asserts that IMLA requires the government to review all leases and lease amendments in order to assure that they are in the best interests of the Indians and that Indian profits are maximized. The Nation contends that the government breached this obligation by prohibiting a 20% royalty rate and approving the Agreement for a lower royalty rate of 12.5%. The Nation also contends that the government violated its general fiduciary duties of care, candor, and loyalty to the Nation by preventing the royalty rate adjustment of 20%, engaging in ex parte communications with Peabody, misleading the Nation into resuming negotiations with Peabody, and approving the Agreement to amend the 1964 Lease without review.

The Nation further argues that the government violated 25 U.S.C. § 396a and 25 C.F.R. § 211.2 by approving the Agreement without any economic analysis. The Nation contends that the government violated 25 C.F.R. § 211.2 by colluding with Peabody to compel further negotiations and by failing to supervise the negotiations. The Nation states that DOI, by allowing a low royalty rate in the Agreement, violated the mini-

[4] The Nation does not appeal the Court of Federal Claims' dismissal of its breach of contract claims.

mum royalty rate established by 30 U.S.C. § 207(a) and the BIA Manual ("BIAM"), 54 BIAM § 604.05. According to the Nation, the government violated the DOI Manual, 130 DM 10.5, and the BIA Manual by failing to perform any economic analysis before approving the Agreement to amend the 1964 Lease. Finally, the Nation argues that the government violated Article VI of the 1964 Lease by preventing a "reasonable" royalty adjustment that was explicitly required by the Lease. The Nation concludes that these specific violations of the government's fiduciary duties entitle it to monetary damages against the United States.

The majority concludes that IMLA and the accompanying regulations, "assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Majority, op. at 1331. Based on this finding of supervision and control, the majority determines that a trust relationship is created, giving the government "a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." *Id.* at 1332. The majority holds that the Court of Federal Claims erred in finding no trust relationship between the government and the Nation with regard to the Nation's coal leases. *Id.* at 1332. Next, noting that the lower court found that Secretary Hodel's actions with respect to BIA's initial royalty rate decision violated common law fiduciary duties owed to the Nation, the majority concludes that the Nation has stated a claim upon which monetary relief can be granted. Id. at 1332. The majority also finds that what it characterizes as the Secretary's "suppression and concealment" of BIA's decision "acted in direct contravention of the [IMLA's] charge to the Secretary

to obtain the Indians the maximum return for their minerals." *Id.* at 1332. It therefore reverses the decision of the Court of Federal Claims dismissing the complaint and remands for further proceedings. Id. at 1333.

I agree with the majority that IMLA and the regulations at 25 C.F.R. part 211 create a scheme under which the government plays a major role in mineral leasing on Indian land and that, therefore, there exists a general fiduciary relationship between the Nation and the government regarding coal leases, such as the 1964 Lease at issue here.

It is at this point, however, that I part company with the majority. A court first must decide whether a general fiduciary relationship exists in a particular area between Indians and the government. Then, it must determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities. It makes this determination by considering the government conduct at issue in light of the requirements of the statutes and regulations that create the general fiduciary relationship in the first place. *See Brown*, 86 F.3d at 1563; *see also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961 (noting that "the statutes and regulation now before us . . . establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." (emphasis added)); *White Mountain Apache Tribe*, 249 F.3d at 1377-80 (determining, after finding a fiduciary relationship, what the government's specific obligations are and whether the statute that created the relationship altered the general law of trusts in any way); *Pawnee*, 830 F.2d at 191 (stating that the existence of a "general fiduciary relationship does not mean that any and every

claim by the Indian lessor necessarily states a proper claim for breach of the trust"). In this case, the majority properly undertakes the first step of the analysis but not the second. After concluding that a general fiduciary relationship exists between the government and Indians with respect to the mining of coal on Indian lands, the majority, focusing exclusively on Secretary Hodel's actions relating to BIA's royalty decision, fails to properly conduct the required second step of the analysis. I believe the majority errs in two respects: first, it fails to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship; second, it only considers one aspect (Secretary Hodel's actions relating to BIA's royalty decision) of the overall government conduct that is at issue.

IV.

In my view, the only government action in this case that implicated a specific fiduciary responsibility to the Nation was DOI's approval of the Agreement. The Nation and Peabody submitted the Agreement to DOI for review. DOI indicated, in an internal report, that it was reviewing the Agreement pursuant to DOI's powers of lease approval under 25 U.S.C. § 396a and the regulations under 25 C.F.R. part 211, sources of law that establish a fiduciary relationship between the Nation and the government. Thereafter, when DOI approved the Agreement, it invoked its approval powers under 25 U.S.C. § 396a and 25 C.F.R. § 211.2, both of which subject the leasing of mineral rights on Indian land to DOI approval.[5] The government's obligation

[5] The Nation also argues that 25 C.F.R. § 211.2 places upon the government the obligation of overseeing negotiations for leases and lease amendments. However, the regulation does not discuss the government supervising lease negotiations. As § 211.2 indicates, the Secretary makes a decision regarding negotiations only if (1) the Indians do not want to take bids and request a negotiation or (2) a negotiation is granted in lieu of bidding and the negotiated document is submitted to the government. Neither situation is present in this case.

under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 is to either approve, or disapprove, a lease, or lease amendment, and since this obligation falls within "the contours of the United States' fiduciary responsibilities," *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961, the government must make its approval decision with the reasonable care and skill demanded of a trustee, *White Mountain Apache Tribe*, 249 F.3d at 1378-79. It is undisputed that, when deciding whether to approve the amendment of the 1964 Lease, DOI failed to perform any economic analysis regarding the lease amendments. In my view, this failure constituted a breach of a fiduciary obligation owed to the Nation. I believe it is reasonable to conclude that one aspect of the lease approval obligation is determining whether a proposed lease is financially beneficial for the Indians involved. *See Restatement (Second) of Trusts* § 174 (1959) (noting that a trustee is under a duty to the beneficiary to administer the trust with reasonable care and skill); *Cheyenne-Arapaho Tribes of Ok. v. United States*, 966 F.2d 583, 589-91 (10th Cir. 1992) (requiring the Secretary of the Interior to consider relevant economic factors before approving a communization agreement under 25 U.S.C. § 396d of IMLA). I do not believe, however, that any of the other breaches that are alleged by the Nation implicate a fiduciary obligation on the part of the government so as to give rise to a claim for monetary damages against the United States.

Initially, the Nation alleges general violations of the common trust obligations of care, candor, and loyalty. In making this allegation, the Nation points to the ex parte communications between Secretary Hodel and Peabody and DOI's failure to secure a 20% royalty rate. While these duties, based on the common law of trust, are relevant to determining the government's obligations, *White Mountain Apache Tribe*, 249 F.3d at 1377-78, the scope and extent to which these obligations apply to governmental action is governed by the statutes and regulations that create the fiduciary relationship, id. at 1380. *See also Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961; *Brown*, 86 F.3d at 1563. The Nation must explain how DOI's actions, which may demonstrate disloyalty to the Nation in a vacuum, fall within the boundaries of a specific fiduciary obligation. That it has not done.

The Nation also alleges violations based on internal agency policy, expressed in BIA Manuals, 54 BIAM § 604.5 for example, and DOI manuals, 130 DM 10.5 for example. Neither of these manuals, or general agency policy, can support a claim for monetary damages because a substantive right to monetary relief must be found "in some . . . source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Mitchell II*, 463 U.S. at 216, 103 S. Ct. 2961 (citing 28 U.S.C. s 1491). The Nation fails to show how these manuals "can be fairly interpreted to create a substantive right to monetary compensation from the United States," *Hamlet v. United States*, 63 F.3d 1097, 1102 (Fed. Cir. 1995).

The same analysis applies to the Nation's claims based upon Article VI of the 1964 Lease and DOI's actions relating to the review of BIA's initial royalty

rate decision. While the language of Article VI states that the government will, after 20 years, raise the royalty rate under the Lease to a reasonable rate, the 1964 Lease is not a document by which the government is bound. Consequently, actions under the Lease are not within the contours of the government's fiduciary relationship with the Nation. As the Court of Federal Claims correctly noted, the government was not a party to the 1964 Lease and there is no evidence of an intent by the government to assume any contractual obligations under the Lease. *Navajo Nation*, 46 Fed. Cl. at 235-36. Finally, the government's actions during the review of BIA's initial decision to raise the royalty rate to 20%, including Secretary Hodel's *ex parte* communications with Peabody and his actions relating to BIA's royalty decision, occurred in the context of DOI's review of an internal decision, under 25 C.F.R. part 2, not in the context of a fiduciary responsibility regarding mineral leases arising under IMLA. The Nation also asserts a breach of trust based on 30 U.S.C. § 207(a), which establishes a minimum royalty rate for coal leases of 12.5%. Section 207(a), which applies to federal land in general, did not apply to leases of Indian land until 1996, when 25 C.F.R. § 211.43(a)(2) was promulgated. The government was not required to conform to the standards set in 30 U.S.C. § 207(a), because, at the time of the government's actions in this case, § 207(a) did not apply to Indian land.

In sum, I agree with the majority that a general fiduciary relationship exists between the government and the Nation with respect to coal leases on the Nation's lands. However, the analysis cannot stop there. In order to state a claim upon which relief can be granted, the Nation must show the breach of a specific

fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue. In my view, the only conduct that is alleged in this case that implicates a specific fiduciary obligation owed by DOI to the Nation is DOI's failure to perform an economic analysis on the Agreement between Peabody and the Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2. I believe that this failure amounted to a breach of a fiduciary obligation owed to the Nation. I would remand the case to the Court of Federal Claims for the limited purpose of determining what damages, if any, the Nation suffered as the results of that breach. Otherwise, I would, in all respects, affirm the decision of the Court of Federal Claims.

For the foregoing reasons, I respectfully concur-in-part and dissent-in-part.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Feb. 4, 2000

OPINION

BASKIR, Judge.

Mr. Donald Hodel, Secretary of the Interior during the critical period of this dispute, offered this denunciation of *ex parte* contacts in his deposition:

> The decision-maker isn't suppose (sic) to talk to one of the two sides while he is in the process of making a decision or may be in the process of making a decision. And it goes to fundamental fairness.
>
> * * * * * *
>
> I should go further in saying one other thing, that the *ex parte* communication taints the subsequent decision. So that even if you would have made exactly the same decision, you can never establish that, if you are challenged on it.

> So it's folly to engage in *ex parte* communications. And I would expect people who dealt with me inside and outside the Department would have known that I would have been pretty firm on that as a matter of practice.

Deposition of Donald P. Hodel, November 20, 1995; I Plaintiff's Appendix (Pl. App.) at 1149-50.

Although Mr. Hodel's memory fails him on this point, the evidence is overwhelming that he did what he condemns. On or about July 17, 1985, he met with a personal friend who had been hired a few days earlier, solely because of his access, by one party in a royalty dispute with the Navajo Nation. The Secretary sided with his friend's new employer in this brief *ex parte* meeting, a meeting which remained undisclosed for eleven years until revealed inadvertently during discovery in this case.

Mr. Hodel might well have added that ex parte contacts, especially those that result in decisions worth millions of dollars to the party with special access to high officials, betray the public trust and transgress the high ideals of public service. Not incidentally, by his conduct Mr. Hodel also violated basic fiduciary duties owed the plaintiff in this action, the Navajo Nation.

Mr. Hodel's July 1985 meeting forms the dramatic centerpiece in the Navajo Nation's suit for breach of trust and breach of contract against the United States. However, it is not the act which the plaintiff contends constitutes the government's specific wrongs. Both breaches allegedly arise from the entire series of events which ultimately resulted in the December 1987 approval by Mr. Hodel of royalty revisions to one of the

Navajo Nation's coal leases with Peabody, the subject of that earlier meeting.

According to plaintiff, by this approval the Secretary breached fiduciary duties owed the Navajo Nation under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.* (IMLA) and related treaties and regulations, and breached contractual obligations under the coal lease itself. The present matter comes before the Court on cross-motions for summary judgment on the issue of liability.

We conclude that the defendant, acting through former Secretary Hodel, violated the most basic common law fiduciary duties owed the Navajo Nation. Regrettably, we also conclude that the trust relationship necessary for our jurisdiction does not exist, and these violations do not mandate monetary relief, both as required by our jurisdictional precedents. We also conclude that the government owed no contractual duty to the plaintiff. We are thus compelled to deny plaintiff's motion for summary judgment and to grant the government's cross-motion.

The Dispositive Motions In Context

A number of related matters require mention at this early juncture to place this Opinion in context. In February 1999, prior to oral argument on these motions, the Navajo Nation filed a collateral lawsuit in United States District Court for the District of Columbia. *The Navajo Nation v. Peabody Holding Company, Inc., et al.*, No. CA-99-469-EGS (D.D.C.). Plaintiff named as a defendant, Peabody, the lessee at the heart of our case. Plaintiff's claims against Peabody evolve out of the same factual context. Also currently pending before our Court is Peabody's motion to find plaintiff in

contempt in connection with the Navajo use in District Court of materials produced in discovery pursuant to a Confidentiality and Protective Order, entered February 26, 1996, in our litigation. Plaintiff subsequently filed a motion asking this Court to determine the status of those same materials, some of which plaintiff claims are not properly subject to the protective order.

In this Opinion, we no doubt make use of documents and information that are the subject of both these motions. However, in preparing this Opinion, we have relied only on the pleadings and other matters of public record. Those pleadings were received in unredacted form and were filed publicly. To this day, Peabody has not sought to apply the protective order to these filings and thereby remove them from the public domain. Although we reserve ruling on the motions respecting plaintiff's activities in District Court and the status of the protected documents, we view any objection by Peabody to inclusion of protected documents in this Opinion as waived.

SUMMARY OF ISSUES

At issue in plaintiff's first claim for relief is the scope of the Secretary's fiduciary duties, if any, under IMLA. Do those duties establish a trust relationship between the United States and the Navajo Tribe the violation of which gives rise to a claim for money damages in this Court? The Navajo Nation has asserted that the statute imposes a host of strict fiduciary duties upon the government and that each of those duties has been clearly breached. In particular, the Navajo Nation contends the statute imposes a fiduciary obligation to maximize the financial returns from coal leases; in this case, a fiduciary duty to require a twenty percent

royalty rate for the Peabody lease. The Secretary's 1987 approval of a rate of 12.5 percent violates this duty.

The government counters that plaintiff's claim is not properly before the Court. First, plaintiff has failed to establish subject-matter jurisdiction in this Court. The trust relationship imposed by IMLA is of so limited a nature, it argues, that it cannot serve as the basis for a claim for money damages. Second, the Navajo's claim is barred by the statute of limitations. Failing those arguments, the government maintains that it is entitled to summary judgment because the Secretary satisfied any fiduciary duties owed the Navajo Tribe.

With the Navajo's second claim for relief, breach of contract, the Court faces issues of fundamental contract formation. Plaintiff alleges that the Secretary violated the pertinent coal lease to which the government was a party when he failed to provide a "reasonable adjustment" of the royalty according to the lease provisions, twenty percent being that reasonable adjustment. In the alternative, plaintiff argues under a contract implied-in-fact theory that the government failed to act in good faith and treat the parties fairly in reviewing and approving lease amendments between the Navajo Nation and the private parties involved in this dispute.

The government denies that the lease formed any contractual relationship between the Secretary and the Navajo Nation. Alternatively, defendant argues that to the extent any contractual duties have been created, the Secretary has sufficiently carried them out. Furthermore, defendant alleges that the breach of contract claim, like the breach of trust claim, is barred by the six-year statute of limitations.

The Court finds the government's statute of limitations argument without merit. However, the statutory and regulatory provisions upon which the Navajo Nation relies are not "money-mandating" as required under the Tucker Act, 28 U.S.C. § 1491 (1988), or the "Indian Tucker Act," 28 U.S.C. § 1505 (1999), to invoke the jurisdiction of this Court and to afford the requested relief. Plaintiff's breach of contract theory is equally unavailing. As we will explain, the Court finds as a matter of law that the Secretary is not a contractual party to the lease in question.

BACKGROUND

A firm grasp of the extensive history of this case is indispensable to an understanding of the trust relationship between the United States and the Navajo Tribe in the mineral leasing context. The parties have spared no detail in describing the background of this case in their briefs and argument. The Court held two hearings on dispositive motions, the first of which exceeded five hours. For the most part, the following series of events is undisputed, and subject only to interpretation.

Introduction

On February 1, 1964, the Navajo Nation, a federally recognized Indian tribe, entered into Lease 8580 with the Sentry Royalty Company for the mining of coal on tribal lands. Pursuant to the Indian Mineral Leasing Act the Assistant Area Director of the Bureau of Indian Affairs (BIA) approved the lease on August 28, 1964, under authority delegated by the Secretary of the Interior.

The original lease provided for an extremely low royalty rate of not more than 37.5 cents per ton, but Article VI allowed the Secretary or his delegate to

adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. Ultimately the Secretary did not exercise this authority. Instead, on December 14, 1987, he approved amendments to the lease, negotiated by the parties, establishing a royalty rate of 12.5 percent.

A few years earlier, in anticipation of the maturity of Article VI, the Navajo Nation had instituted proceedings in the Department of Interior (DOI) with a view toward converting the royalty to a percentage basis, and dramatically boosting its level. At this time, the rate for coal leases on federal lands was 12.5 percent, which the Navajo considered a minimum. Indeed, the first-level DOI authority's initial decision in June 1984 was to increase the royalty to a rate of twenty percent. The lessee, Peabody Coal Company, Sentry's successor in interest, appealed that decision.

By mid-summer 1985 it was apparently well-known to all parties that the BIA planned to deny the appeal and affirm the twenty percent rate. The Secretary then intervened and directed that the decision on Peabody's appeal be deferred so that the parties to the lease could negotiate a royalty rate. This directive, the events leading up to it, and the Secretary's subsequent approval of a lease package the parties negotiated, form the basis of plaintiff's breach of trust and contract claims. With this outline in mind, we now examine the events and their legal context in more detail.

Basis of Trust Relationship

Two treaties—the 1849 Treaty and the 1868 Treaty —form the foundation of the trust relationship between the United States and the Navajo Nation. See 9 Stat. 974; 15 Stat. 667. Under the 1849 Treaty, the United

States assumed the responsibility to regulate trade and intercourse with the Navajo and to secure their permanent prosperity and happiness.

The principles of the treaties were echoed in the policies and procedures established by the United States. The BIA was established as an agency within DOI in order to encourage and train Indians to manage their own affairs and to utilize fully their natural resources under the trust relationship. As early as 1975 it was DOI policy to provide technical assistance to assure that development of coal resources provided a fair monetary return. Furthermore, the Code of Federal Regulations and departmental manuals governing the affairs of Interior and its agencies establish procedures intended to prevent private industry from exploiting Native Americans in the management of their resources. These measures range from placing limitations on the tribe's negotiations to providing technical and economic support for mineral management.

The Royalty Rate Revision of Lease 8580

The cents-per-ton basis of determining royalties under the original 1964 lease was, by any measure, an inequitable deal for the mineral owner. In fact, in 1977 Congress set a 12.5 percent minimum royalty rate for federal strip-mined coal, and the Department of the Interior adopted a policy prohibiting the federal trustee of Indian coal from approving a tribal coal lease with royalties less than that amount.

During this same period, it was noted that Lease 8580 violated several of the limitations later put in place by the DOI and BIA. Economic studies, some commissioned by federal agencies, confirmed that the royalty rate was not providing the Navajo a fair return for

their coal. It is in this context that on June 18, 1984, Donald Dodge, the BIA Navajo Area Director, implemented Article VI and significantly raised the royalty rate to twenty percent. This decision was made under delegated authority of the Secretary of Interior, and in consultation with the Department of Justice.

Appeal of the Rate Adjustment

Not surprisingly, the prospect of such a significant increase in the cost of coal concerned Peabody and its major utility customers, Southern California Edison Company and the Salt River Project Agricultural Improvement and Power District (collectively, the "companies"). The companies appealed the Area Director's decision formally in July 1984. However, the record also establishes parallel *ex parte* attempts on behalf of industry representatives to communicate with those deciding the appeal. Whether these attempts sought to overturn the adjusted rate or merely to defer the decision on appeal is not clear. What is clear is that they were rebuffed by then-Secretary William P. Clark, who had a firm policy against *ex parte* meetings. The Navajo were apparently not apprised of the efforts.

John Fritz, Acting Assistant Secretary of Interior for Indian Affairs, the decision-maker on Peabody's appeal, took the matter under consideration. In March 1985, Mr. Fritz granted the companies' petitions to supplement their briefs, and asked them for additional cost, revenue and investment data. This request apparently led the companies to suspect that the decision was going to be favorable to the Navajo.

On April 16, 1985, the Supreme Court decided *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985). That case

upheld Navajo taxes that had been contested by the companies, and supported the Navajo Nation's position that it was entitled to obtain maximum revenues from its mineral leases. This confirmation of tribal authority no doubt concerned the companies, and arguably improved the bargaining position of the Navajo, who had broken off negotiations on lease amendments in November 1984 to await a decision on the appeal.

In June 1985, the decision document affirming the Area Director's decision awaited Mr. Fritz's signature. The companies learned that a decision affirming the twenty percent adjustment was imminent. On July 5, 1985, Peabody wrote a letter to Secretary Hodel requesting he postpone decision on the appeal and force the Navajo to negotiate. This letter was provided to the Navajo Nation, which promptly rejected further negotiations and urged DOI to decide the appeal with all deliberate speed.

However, the Navajo were not made aware of other lobbying efforts aimed at delaying the rate decision. Early in July 1985, Peabody retained Stanley Hulett, a former high-level DOI employee and close personal friend of the new Secretary. Mr. Hulett had been recommended by Southern California Edison Company, one of the power plant customers which relies upon the coal mined by Peabody. There is little doubt that Mr. Hulett met with Secretary Hodel, probably on July 17. On July 22, 1985, a Peabody attorney named Edward Sullivan drafted an internal company memorandum describing what transpired in the meeting. The memorandum demonstrates that even Peabody attorneys speculated on "whether this activity would be considered an '*ex parte*' contact as part of Peabody's appeal

of the Navajo Area Director's decision." *See* I Pl. App. 595-96.

On or shortly after the date of the ex parte meeting, Secretary Hodel signed a memorandum prepared by Peabody, making only one insignificant change in the company's draft. Copies of the draft and the version signed by the Secretary are attached as appendices to this Opinion.

In the memorandum, melodramatically described by a former DOI official as a "march or die" order, Secretary Hodel instructed Mr. Fritz not to issue the appeal decision affirming the twenty percent rate. Instead, he adopted the companies' preference and directed negotiations. Mr. Fritz, who subsequently made no secret of his sympathy for the Navajo Nation and his unhappiness with these developments, resigned in August, pursuant to an earlier decision.

Secretary Hodel's directive was not revealed to the Navajo Nation. Instead, on August 29, 1985, well after the Secretary's order deferring the rate decision in favor of negotiations, the Navajo Nation was informed or, more accurately, misinformed:

> The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal by Peabody of the Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.
>
> As you are aware the briefing schedule has been completed and a *decision on the appeal is currently being considered* by the Deputy Assistant Secretary —Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding

settlement but *the decision has not yet been finalized.*

I Pl. App. at 622 (Letter from Tim Vollman, Associate Solicitor, Indian Affairs) (emphasis added).

Events then moved at a rapid, albeit puzzling pace. Despite the apparently imminent favorable decision on their twenty percent rate adjustment, in the face of an eight year history of desultory negotiations with the companies, and despite a firm refusal re-iterated just a month earlier to resume talks pending a decision on the Dodge royalty adjustment, the Navajo Nation changed course immediately and dramatically.

Promptly upon receipt of Mr. Vollman's letter, the Navajo Nation abandoned its five-year effort to have the rate revised by the DOI, and on August 30, 1985, resumed discussions with Peabody that had broken off a year earlier. They quickly reached a tentative agreement within a month, by September 23, 1985. This agreement, negotiated under the auspices of Chairman Peterson Zah, was noteworthy for its adoption of the 12.5 percent federal royalty rate, nowhere near the twenty percent rate under appeal. The agreement initially failed to get Tribal Council approval, but it survived without major change an insurgent victory by Peter MacDonald later that year for Navajo Nation leadership. (MacDonald, as Chairman, had begun negotiations with Peabody back in 1979). In late 1987, essentially the same agreement was formally approved by the Navajo Nation and referred to DOI for review.

The abrupt abandonment of their effort to have DOI set a high royalty rate at the moment of its apparent success, and the Navajo Nation's return to negotiations they had broken off and had steadfastly refused to

resume, defy explanation on this record. So does the breathtaking speed with which the parties reached an agreement that had eluded them for so many years. The record is bare of any formal communication by the Navajo Nation on the status of the appeal between September 1985 and December 1987, although there is a suggestion of an isolated and unsuccessful inquiry in 1986 or 1987.

The Navajo Nation has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results. At most they admit that "someone from Washington" had urged a return to the bargaining table. No less intriguing and unexplained is the fact that the agreement reached in September 1985, with its 12.5 percent rate, survived without change in the face of political upheavals in the Navajo Nation leadership.

The Negotiated Amendments

Apparently the favorable decision in *Kerr-McGee* prompted Mr. Zah to expand the scope of negotiations on the royalty rate adjustment to other topics such as tax matters. Consequently, the renegotiated agreement encompassed not only a 12.5 percent royalty on Lease 8580, but confirmed the validity of tribal taxation. It also raised the royalty rate to 12.5 percent on two other leases which were not by their terms subject to rate revision. The agreement also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments. And, as the government points out, the agreement obviated a long, costly and uncertain legal challenge by Peabody.

Soon after a tentative agreement had been reached, the tribal leadership passed to Peter MacDonald, who quickly reached essentially the same deal with the companies by the fall of 1985, preserving the adjustment of the royalty rate at 12.5 percent. The Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties. The tax increases that the companies would likely face in light of the *Kerr-McGee* decision were capped at eight percent. The effect of these provisions would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined.

Approval of Negotiated Lease Amendments

The agreement reached by the successive Navajo Nation administrations remained fixed for over two years. It was conditioned upon the approval of this same rate for another lease, Lease 5743, which was a joint enterprise of the Navajo Nation and Hopi. This lease did not provide for any rate revisions. The Hopi approved that lease's amendment in July 1986. The amendments were formally placed before the Navajo Nation Tribal Council and approved by that body in August 1987. Subsequently, Peabody and the Navajo executed the amendments, making them ripe for Secretarial review pursuant to the IMLA. Although the parties do not raise the point, we would be surprised if the Department was not fully apprised of the draft months, if not years, earlier.

On November 26, 1987, the agreement was officially forwarded to DOI for its review and approval as required by IMLA. Given the twenty-year history of Lease 8580 under the previous provisions and the long negotiating process ultimately resulting in the new lease terms, the facts indicate a relatively quick review

process of a few days over the Thanksgiving holiday. Plaintiff condemns this "rush job" and notes that a flawed economic analysis of the lease amendments was performed as part of the review process. And one of the officials in the DOI to whom the amendments were sent for review, Mr. Frank Ryan, refused to sign his approval because he felt he "would be participating in a breach of trust." Deposition of Frank Ryan, November 7, 1995; III Pl. App. at 1510.

On December 14, 1987, the Secretary formally approved the lease amendments. The recommendation accompanying the endorsement asserted as a basis for approval "that the parties ha[d] negotiated at arm's length, in good faith to reach [the] amendments." Four days after the approval, the BIA Navajo Area Director's royalty adjustment of twenty percent, dating back to June 18, 1984, was formally vacated.

DISCUSSION

The Statute of Limitations

Plaintiff filed this case on December 14, 1993, the sixth anniversary of the Secretary's approval of the lease amendments. The government does not agree that the statute of limitations begins to run with the Secretary's approval. The government argues that to the extent plaintiff's claim is based on the Secretary's actions in July, 1985, the claim is time-barred under the six-year statute of limitations. *See* 28 U.S.C. § 2501 (1999). We reject that position for two independent reasons: (1) the Navajo Nation's cause of action had not yet accrued in July, 1985; and (2) the Secretary's conduct remained secret until after the Navajo Nation's complaint was filed.

Accrual of a cause of action occurs "when all events which fix the government's liability have occurred and the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original); *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988); *see also, Sankey v. United States*, 22 Cl. Ct. 743 (1991) (statute begins to run when underlying facts of claim become known or knowable to plaintiff), *aff'd* 951 F.2d 1266, 1991 WL 260869 (1991). In our view the events that transpired in July 1985 initiated a course of conduct that was complete only with the challenged approval of December 1987. The government does not contend any claim based on the 1987 approval is barred. *See* Def. Clarification of Certain Proposed Findings of Fact at 1-2. The Navajo Nation's claim cannot be barred while events that directly affect the rights asserted have yet to take place.

Further, when the Navajo Nation filed its complaint it was unaware, through no fault of its own, of the July 1985 events. The complaint challenged the December 1987 approval. The statute of limitation does not run against a plaintiff who is unaware of a cause of action, whether because the defendant concealed the actions or because the injury was inherently unknowable at that point in time. *LaMear v. United States*, 9 Cl. Ct. 562, 569, *aff'd*, 809 F.2d 789 (Fed.Cir.1986) (citations omitted.) The parties' submissions concerning the events following the Hodel-Fritz memorandum reveal no evidence that the Navajo Nation was aware of the memorandum or the meeting that produced it. Speculation aside, the Navajo Nation states it first became aware of the Secretary's July 1985 decision in 1994, but they offer no specifics. The Sullivan memorandum

debriefing the meeting and its antecedents, was not produced until January 31, 1997. The government has not rebutted the Navajo Nation's claim that it was unaware of Secretary Hodel's actions before this.

Unaware of the earlier events, the Navajo Nation initially urged in its complaint that the December 1987 approval itself constituted a breach of trust. Having learned more from discovery—that is, after all, the purpose of discovery—the Navajo Nation now argues that the 1987 approval was tainted by the July 1985 events, among other things. The statute of limitations is intended to avoid the prosecution of stale claims which might prejudice the defendant; it does not preclude early evidence supporting timely claims. Sankey, 22 Cl. Ct. at 747 (citations omitted). Had the Navajo Nation sued for breach of trust in 1985, the government could persuasively have argued that the claim was not yet ripe for this Court's review.

Standard of Review

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 670 (1997). In its consideration of motions for summary judgment, the Court relies upon the pleadings, depositions, answers to interrogatories, answers to admissions, and affidavits, and especially in jury cases, resolves all reasonable inferences in the light most favorable to the non-moving party. RCFC 56(c). Where, as here, both parties have moved for summary judgment as to plaintiff's fiduciary claim for relief, it is incumbent upon the Court to evaluate each motion on its own merits. *Kanehl v. United States*, 38 Fed. Cl. 89, 98 (1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317,

322-23, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)). Although the existence of a dispute on a material fact would defeat a summary judgment motion, there are, as we have said, no such disputes.

Breach of Trust Claim

The relationship between the United States government and Native American tribes is a fiduciary one, with the United States serving as trustee for the Indians. This trust was first created when the government entered into treaties with Indians concerning the use and occupation of tribal lands. The Navajo Nation, like other tribal governments, has reserved the right to live off of the bounty of their natural resources while entrusting the government to develop those resources in order to secure the prosperity of the Indians. Although the fiduciary relationship between Native Americans and the federal government is not necessarily described by the common law of trusts, we find it useful first to measure the government's actions against this familiar standard. The standards governing private fiduciaries and their beneficiaries provide effective analogies in the Indian claims context. *Nevada v. United States*, 463 U.S. 110, 127, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); *Mitchell v. United States*, 229 Ct. Cl. 1, 14, 664 F.2d 265, 274 (1981), *aff'd*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Begay v. United States*, 16 Cl. Ct. 107, 127 n.17 (1987).

Breach of Trust in Court of Equity

The basic duties owed a beneficiary by a trustee are clear—care, loyalty, and candor. A trustee must use reasonable skill and care both to preserve the trust property and to make it productive. *See generally*, RESTATEMENT (SECOND) OF THE LAW OF TRUSTS

§§ 174-76, 181 (1959). Furthermore, a trustee is obligated to administer the trust solely in the interests of the beneficiary, over the interests of third parties and even over those of the trustee, itself. *Id.* at § 170. Finally, both of these duties implicate a third responsibility of the trustee—the obligation "to communicate to the beneficiary material facts affecting the interest of the beneficiary which [the trustee] knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." *Id.* at § 173, Comment d. Needless to say, a fiduciary may not deal in secret with a third party to his beneficiary's detriment. Collectively, these duties call for the trustee continually to show good faith and fair dealing. *See generally*, GEORGE GLEASON BOGERT AND GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 541, 543-44 (2d ed. rev. vol. 1993).

Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events. Even under the most generous interpretation of the series of events leading up to the approval in December 1987 of the renegotiated lease package, the Secretary of Interior violated his common law fiduciary responsibilities.

The government argues that the settlement package ultimately approved gave the Navajo a *quid pro quo* for any reduction in the royalty rate. This argument has

some appeal when we consider that the Navajo requested the Secretary to approve the lease amendments. After all, the Secretary also must consider the right of tribes to govern their own affairs, which includes making intelligent choices such as trade-offs in royalties for other economic benefits. At oral argument, plaintiff conceded that there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation—counsel informed the Court that the Navajo did not wish to invalidate the entire agreement.

But we do not have to look to the end result to find a breach—the road to approval of the amendments is much more disturbing. A fiduciary's breach is not negated by a favorable end result; it requires full disclosure and ratification, both absent here. *See* BOGERT, *supra*, § 543 at 247 n.18 ("in the application of the loyalty rule to fiduciaries the courts are not concerned with the question of actual damage to the beneficiaries in the case at hand, but rather in the preventative aspects of the rule and with the possibilities of loss in trust administration in general.") (citation omitted); *cf.* REST. 2D, *supra*, §§ 213 and 216. Even if the 1987 approval was a correct outcome, Secretary Hodel has accurately observed "that the *ex parte* communication taints the subsequent decision . . . even if you would have made exactly the same decision." Hodel Dep., I Pl. App. at 1149-50.

Entirely independent of whether profits were maximized, the Secretary and members of the Department engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship. Then after very briefly reviewing the merits of the proposals, the Secretary approved lease amendments with royalty rates well

below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans.

Defendant argues that in suspending Mr. Fritz' proposed ruling, the United States simply allowed the Navajo Nation to exercise its sovereignty in negotiating terms for the Lease 8580 amendments and in gaining additional ground through the bargain regarding other leases and tax matters. The same rationale is asserted as the justification for the Secretary's approval of the amendments—the Secretary was hesitant to intrude upon "arms length negotiations."

A negotiator's weapon is knowledge. On this record, we can only conclude the Navajo entered the process unarmed with critical knowledge. Clearly, with Mr. Dodge's twenty percent royalty adjustment and Mr. Fritz' pending endorsement of that adjustment, the Navajo Nation had the upper hand for any negotiated settlement. In August 1985, when it resumed negotiations with the companies, the Navajo Nation no longer enjoyed the benefit of the threat that the twenty percent royalty rate was about to be affirmed.

Worse yet, the Navajo Nation was not aware that it no longer had this competitive edge in its bargaining, while the companies were well aware of the fact. In its late August 1985 response to the Navajo's inquiry on the matter, the Department of Interior had represented that the decision had not yet been made. The correspondence made no mention of the *ex parte* contacts or the fact that the Secretary had already determined to defer decision on the appeal in favor of negotiations. Unaware that the Secretary had already promised their opponents he would not decide the dispute, the Navajo

Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody and the utilities that purchased the Indian coal.

Incidentally, we imply no comment on the actions of Peabody or any of the other private interests involved. Plaintiff has sued them in District Court, where the appropriateness of the *ex parte* efforts to influence Messrs. Hodel and Fritz may ultimately be determined. But that would not change our view of the official government conduct in this matter. For as Justice Benjamin N. Cardozo observed prior to his appointment to the Supreme Court, "[m]any forms of conduct permissible in a workaday world for those acting at arms length, are forbidden to those bound by fiduciary ties." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). Subsequent events do not obviate our expectation that the Secretary's conduct be "kept at a level higher than that trodden by the crowd." *Id.* at 547.

The Court finds that the United States violated the most fundamental fiduciary duties of care, loyalty and candor. These violations, serious as they are, do not themselves confer jurisdiction on this Court, nor entitle plaintiff to money damages. Were this a court of equitable jurisdiction considering a private trust, plaintiffs might easily qualify for remedies typically afforded wronged beneficiaries. *See, e.g.*, BOGERT, *supra*, § 963 at 48 (suit for accounting and damages based on breach of trust normally brought in court of equity). But a greater showing is required to warrant a remedy in this Court.

Breach of Trust in the Court of Federal Claims

In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages. If plaintiff fails to meet these requirements, we must reject its complaint for want of jurisdiction or failure to state a claim, or on summary judgment. While these are conceptually different issues, they tend to merge, especially in this case.

This Court's jurisdiction requires that the substantive right to monetary recovery be found in some source of law, independent of the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) (*Mitchell II*); *United States v. Testan*, 424 U.S. 392, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). Plaintiff asserts as its independent basis the trust duties that are created by IMLA. Therefore, pursuant to 28 U.S.C. §§ 1491 and 1505, plaintiff must convince this Court that IMLA can fairly be interpreted as mandating monetary damages from the United States for the violations it claims. *Mitchell II*, 463 U.S. at 218, 103 S. Ct. 2961.

While it is not necessary that the statute explicitly state the right to damages, the government's obligation to pay must be clear and strong. *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 232 (1983). The mere existence or even the breach of a limited trust relationship between the government and an Indian tribe does not establish a claim for money damages within the meaning of the Tucker Act. *United States v. Mitchell*,

445 U.S. 535, 542, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*). It is for this reason that the serious fiduciary abuses we identified earlier are insufficient to afford relief in this Court in and of themselves. *See Montana Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601, 613-14 (1985) ("The general trust relationship in itself does not impose such duties as are erected in a complete trust with fully accountable fiduciary obligations. When the source of substantive law intended and recognized only the general, or bare, trust relationship, fiduciary obligations applicable to private trustees are not imposed on the United States.") To establish a "complete" fiduciary duty, there must be more than simply a process that was "designed to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior". *Id.* at 614. To serve as a basis for jurisdiction, the trust responsibility must mandate particular monetary relief upon the basis of statute, treaty, or assumption by the government of the task of managing economic assets.

Since no authority relied upon by plaintiff explicitly provides for monetary relief, we look toward the level of management and control that the government has assumed over coal leases under IMLA. Whether the trust responsibility the Secretary is alleged to have violated is "money mandating" can only be determined by evaluating the underlying statutory scheme. *See, e.g., Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961. Accordingly, we review IMLA and the regulations promulgated pursuant thereto, and then compare them to cases applying the *Mitchell* tests.

The Indian Mineral Leasing Act of 1938

The Indian Mineral Leasing Act of 1938, provides:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction . . . may, *with the approval of the Secretary of the Interior*, be leased for mining purposes, *by authority of the tribal council or authorized spokesman for such Indians*, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

25 U.S.C. § 396a (emphasis added). The remainder of the Act is very general, providing for the acceptance of surety bonds by the mineral lessee (25 U.S.C. § 396c), the promulgation of rules and regulations governing mining operations (25 U.S.C. § 396d), and the delegation by the Secretary of lease *approval authority* (25 U.S.C. § 396e). We note, however, that the legislation also contains separate provisions, more exacting requirements if you will, for the leasing of oil and gas. *See* 25 U.S.C. §§ 396b, 396d, 396g; *see also Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (in reviewing Secretary's duties respecting oil and gas leasing, Court observed that IMLA "imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of the Indians."); accord, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-65 (10th Cir. 1984).

We recognize that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S. Ct.

2399, 85 L. Ed. 2d 753 (1985) (leasing procedures detailed by Congress intended to protect the Indians). In fact, the measure was passed in part because existing law was considered inadequate to give the Indians the greatest return from their property. S. REP. NO. 75-985 (1937). Other purposes in enacting the legislation were to achieve uniformity in tribal leasing and to increase Indian authority in granting leases. *Id.* In general, then, IMLA imposes upon the federal government a fiduciary obligation to develop a mineral leasing program which would provide the highest possible financial return to the Indians. *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 238 (1985); *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 33 Fed. Cl. 464, 468 (1995)(recognizing 10th Circuit's finding of breach of trust).

These responsibilities fall upon the Secretary of Interior and the officials in the specialized subordinate agencies within the Interior Department. Those agencies have, in turn, promulgated regulations governing mineral leasing on tribal lands.

The provisions for leasing of tribal lands for mining that were in effect at the time plaintiff's cause of action accrued are set out in 25 C.F.R. Part 211 (1985). The procedures described within Part 211 cover all mineral leasing, not just coal. Like the statute itself, the regulations give extra attention to oil and gas leases. We mention this because plaintiff has proposed that management of coal leasing is indistinguishable from oil and gas leasing under *Pawnee v. U.S.*, 830 F.2d 187 (Fed. Cir. 1987), *cert. den'd*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), a case which we discuss momentarily.

Although the Navajo Nation has not specifically addressed many of these regulatory provisions, we have reviewed them at length. There are provisions on the manner of payments, inspections, penalties, fees, and cancellation. There are also a host of provisions governing mining operations, primarily for petroleum products. Finally, the item of interest here is addressed—royalties. With respect to royalties, sections 211.13, 211.16, and 211.17 contain very extensive and explicit procedures governing royalties *for oil and gas leases*, including criteria by which the Secretary is to set royalty rates for oil and gas leases. By comparison, the only provision governing royalties of coal, in particular, tersely states:

> [f]or coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

25 C.F.R. § 211.15(c). In glossing over these regulatory provisions, the Navajo Nation has necessarily failed to demonstrate how the Secretary violated his duty under the regulations, if such a duty is created by those provisions.

Plaintiff's briefs do make several references to regulations demonstrating a preference for competitive bidding over the negotiation of leases by tribal authorities. *See* 25 C.F.R. § 211.2. As plaintiff explains, the provision is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources. Pl. Br. at 41, 44; Pl. Resp. at 46. Although the Navajo Nation cites case law demonstrating the point, it cites no decision of this Court, nor does it provide any authority

for the proposition that violation of the regulation calls for money damages. In any case, the competitive bidding provision is inapposite. Such a provision by definition applies to the negotiation of a new leases among a number of potential lessees, not the renegotiation between lessor and lessee of a term in a pre-existing lease.

In addition to those procedures defined within the Code of Federal Regulations, the Navajo Nation has cited internal policies and procedures in the DOI Manual and Bureau of Indian Affairs Manual. Pl. Br. at 6. These manuals acknowledge the general duty to maximize income from Indian mineral leasing. Consistent with this goal, the manuals prescribe economic appraisals of the transactions between Indians and private companies such as Peabody.

We have on prior occasions recognized that the statutory and regulatory framework governing mineral leasing under IMLA requires the Secretary to use reasonable skill and care in maximizing economic benefits for the Indian lessors. *Cheyenne-Arapaho*, 33 Fed. Cl. at 468; *Navajo Tribe*, 9 Cl. Ct. at 238. However, IMLA has a second purpose—to foster Indian self-determination. The legislative history indicates that prior to enactment of the IMLA Indians were on occasion compelled to lease land over their opposition. S. REP. NO. 75-985, at 2. Accordingly, IMLA clearly stops short of turning over control to the Secretary, providing that "lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, *by authority of the tribal council or other authorized spokesman* . . ." 25 U.S.C. § 396(a) (emphasis added). The ideal of Indian self-

determination is directly at odds with Secretarial *control* over leasing.

The lease itself reflects the measure of control assumed by the Navajo, and the correspondingly subordinate role of the Secretary: (1) the Secretary may suspend the lease for economic reasons, but only with the concurrence of the Navajo—Art VIII; (2) the lessee may not assign the lease without Secretarial and Navajo consent—Art XI; (3) the lessee's account books are open to Secretarial and Navajo inspection—Art XIII; and (4) the Navajo and the Secretary reserve the right to cancel the lease for violations of its terms by the lessee. And, of course, the Secretarial power to adjust rates after twenty years is conferred by the lease—Art. VI. *See Lease* 8580 (Feb. 1, 1964).

Navajo Coal Mining in Context

There is a wealth of case law presenting varying degrees of federal management of or control over the administration of Indian leases. The landscape includes the Supreme Court's decisions in *Mitchell I* and *Mitchell II* at the polar extremes. Finding their place along the resulting continuum, the cases of *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), *Wright v. United States*, 32 Fed. Cl. 54 (1994), and *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), provide useful correlations. *Wright* and *Brown* both involve leasing activity by Indians on allotted lands. In *Wright*, the limited Secretarial "approval only" role was insufficient to invoke the jurisdiction of the Court. Conversely, the statutory scheme in *Brown* permitted the Secretary to cancel a lease without the consent of the Indian lessors, and was considered sufficient for jurisdiction.

In *Mitchell I*, the Supreme Court evaluated this Court's jurisdiction over claims arising from the government's alleged mismanagement of timber resources on land allotted to Indians under the Indian General Allotment Act of 1887, 25 U.S.C. § 331 *et seq.*, and found it wanting. Specifically, the Court examined whether a trust duty to manage these resources was comprehended by the General Allotment Act. In holding that the Act created only a limited trust relationship between the government and Indian allottee, the Supreme Court reversed the Court of Claims' *en banc* recognition of a fiduciary duty which conferred jurisdiction. *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349. Although land allotted to Indians was to be held in trust by the government, that particular legislation left it to the Indian allottee to use the land for agricultural and grazing purposes. Therefore, reasoned the Supreme Court, "the Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* (emphasis added).

Upon remand, however, the Court of Claims found that a host of other statutes and regulations governing everything from timber sales to conservation responsibilities created the specific fiduciary duty found lacking under the general allotment scheme. *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265 (1981). The Supreme Court ultimately agreed, holding that the "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber" gave rise to an expectation of benefit sufficient to confer jurisdiction on this Court for breach of those responsibilities. *Mitchell II*, 463 U.S. at 222-24, 103 S. Ct. 2961 (citation omitted).

The statutes and regulations cited in *Mitchell II* illustrate pervasive governmental control and daily supervision over the management and sale of forest products on allotted land—comprehensive regulations "addressed virtually ever aspect of forest management" and conditioned approval of timber sales on compliance with their requirements. *Mitchell II*, 463 U.S. at 219-22, 103 S. Ct. 2961. Therefore, this Court clearly has jurisdiction over breach of trust claims where the corpus of the trust is a resource over which "[v]irtually every stage of the process is under federal control." *Id.* at 222, 103 S. Ct. 2961 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)).

In the aftermath of *Mitchell I* and *Mitchell II*, claims based upon fiduciary duties respecting the management of those resources are denied where the government's supervision and control over tribal resources is limited. Implicated in every instance is the delicate balance struck between exercising fiduciary responsibilities and respecting tribal sovereignty and self- determination.

The *Brown* case involved commercial leasing activity on allotted land. The Court of Appeals for the Federal Circuit evaluated the fiduciary relationship formed under the Indian Long-Term Leasing Act (*see also*, *Pawnee*, 830 F.2d 187 (Fed. Cir. 1987)) and the Indian General Allotment Act (see also, *Mitchell I*, 445 U.S. 535, 100 S. Ct. 1349, 63 L.Ed.2d 607 (1979)). Acknowledging that the statutes and regulations did not confer upon the Secretary comprehensive management leasing under that scheme. It thus focused on the second prong in *Mitchell II*. The "management" test looks to the existence of a "comprehensive" scheme for there to be a trust relationship sufficient for our Court to have

jurisdiction. By contrast, the "control" test has no such qualifiers. *See Brown*, 86 F.3d at 1560-61. The Federal Circuit held in *Brown* that the commercial leasing program gave the Secretary effective control over leasing of allotted lands which must be exercised for the benefit of the Indians. *Id.* at 1556, 1561. Under those circumstances, the Court found that the government had assumed an enforceable fiduciary duty sufficient for Court of Federal Claims jurisdiction. *Id.* at 1563.

In particular, the Court distinguished between mere "oversight power" to review transactions already negotiated and executed by others, and the broader authority over commercial leasing under the Indian Long-Term Leasing Act. *Id.* at 1566. Allottees, for example, were entitled to lease allotted lands only for certain statutorily prescribed purposes and only after seeking the permission of the Secretary of the Interior and complying with terms and forms dictated by the Secretary. *Id.* at 1561-62. Furthermore, under the commercial leasing scheme, the allottee could not cancel a lease without prior approval of the Secretary. By contrast, the Secretary was entitled to cancel a lease even over the protest of the Indian allottee-lessor. *Id.*

The regulations at issue here also require use of certain forms, an unremarkable requirement in our view. 25 C.F.R. § 211.30. Likewise, the regulations provide for Secretarial cancellation, but only for cause, an important distinction from the regulations in Brown. 25 C.F.R. §§ 211.27, 211.22. On the whole, IMLA and the 25 C.F.R. Part 211 regulations, especially as they relate to the leasing of coal, preserve the Indians' ability to enter into and cancel leases. As we noted earlier, IMLA sought to remedy situations in which "the Indians at no time ha[d] any voice in the granting

of such leases." S. REP. NO. 75-985 at 2; *see also, Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981) (one aim of the 1938 Act was to give "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.")

The regulatory scheme for coal stands in stark contrast to that for oil and gas. A number of cases have found the oil and gas program amounts to a jurisdictional trust. *Cheyenne-Arapaho Tribes v. U.S.*, 33 Fed. Cl. 464 (1995); *Pawnee*, 830 F.2d 187 (Fed. Cir. 1987); and *Assiniboine and Sioux Tribes*, 792 F.2d 782 (9th Cir. 1986). That, however, has not happened as respects coal. *Compare, Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227 (1985) (Lydon, J.) (Court assumed the existence of a jurisdictional trust for minerals in general, but without extensive analysis). Unlike the commercial leasing in *Brown*, mineral leasing under IMLA requires the consent of the Indian lessor before the Secretary may take actions affecting the lease. *See, e.g.*, 25 CFR § 211.14a (Secretary may authorize suspension of mining operations only after obtaining the consent of the tribe).

In *Wright*, this Court found jurisdiction lacking. There, we revisited the allotment regulatory scheme, this time in relation to the leasing and permitting of Indian allotted lands. In an attempt to escape the result reached in *Mitchell I*, the plaintiff in *Wright* focused upon the Secretary of Interior's power to authorize leases, arguing that this role extends the Secretary's relationship beyond a bare or generalized trust. However, the Court found that "the Govern-

ment's role in leasing is limited to final review of leases negotiated by others." *Wright*, 32 Fed. Cl. at 58. Such a role, standing alone, is insufficient to create the type of fiduciary duty that can be enforced through a money remedy in this Court. *Id.* at 59. We concur.

Finally, there is the *Pawnee* case, in which federal responsibilities for management of oil and gas leases were at issue. Reversing this Court's holding to the contrary, the Federal Circuit found that the statutes and regulations established fiduciary duties that mandated compensation for breach. *Pawnee*, 830 F.2d at 190. Not only was there "comprehensive management," but there were also specific financial responsibilities, very much akin to those of private trustees. Like the Navajo Nation, the Pawnee tribe complained that the Secretary violated his fiduciary duty when he received royalties below market value. Even in the context of what we might describe as a "financial trust," the Court concluded that the Secretary's discretion in rate-setting did not obligate him to set the highest rate.

As we have noted, the statutory and regulatory context from which the *Pawnee* claims evolved is quite different from the coal regulatory scheme, and especially the general provision for royalty adjustment under IMLA. One of the statutes relied upon by the Pawnee is entirely dedicated to management of oil and gas royalties. The two statutes—the Indian Long-Term Leasing Act, 25 U.S.C. § 396 (1988) and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 (1988)—and a large body of regulations gave the Secretary broad authority in leasing property and in collecting royalties on behalf of the Indians. In sum, those authorities clearly demonstrated that "the United States has exercised its super-

visory authority over oil and gas leases in considerable detail." *Pawnee*, 830 F.2d at 190 (quoting *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968)).

As under the IMLA scheme, the discretion vested in the Secretary by the statutory authority cited in Pawnee was to be exercised to serve the interests of the Indian trustees. However, the level of management and control exercised by the Secretary in the oil and gas leasing context more closely resembles that of the forest management scheme in *Mitchell II*, than the regulation of coal leasing at issue here. For instance, in describing the Indian Long-Term Leasing Act—one of two authorities invoked in Pawnee—the Court wrote:

> This statute places the Secretary of the Interior at the center of the leasing of Indian mineral lands. He determines whether to consent to a lease and the terms of the lease; he performs 'any and all acts' necessary to carry out the statute 'into full force and effect . . .'.

Id. at 189.

Furthermore, in *Pawnee* the Court cited a litany of regulatory provisions dealing specifically with aspects of the management of royalties, the very item of which those plaintiffs complained. In our case, the regulations and statutory provisions cited by the Navajo cover a range of issues from mining operations to rights-of-way, but touch only summarily on the topic of royalties. *See* Pl. Br. at 34 (*citing*, 25 C.F.R. Part 211 (1985); 25 C.F.R. Part 169 (1985); 25 C.F.R. Part 200 (1993); and 25 C.F.R. Part 216 (1985)).

The Secretary's Duties Defined

Defendant concedes that the Secretary owes some measure of trust responsibility, but argues that the responsibility as it relates to coal royalties does not rise above a generalized trust obligation. We agree. Under *Mitchell II*, the contours of the trust responsibility are defined by statute and regulation. *See Brown*, 86 F.3d at 1563 (citing *Pawnee*, 830 F.2d at 192, and *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961). In order for a trust relationship to support an action for money damages, those "statutes and regulations must 'unambiguously provide that the United States has undertaken full fiduciary responsibilities' *as to the particular aspect of the relationship complained of.*" *Wright*, 32 Fed.Cl. at 56 (quoting *Mitchell I*, 445 U.S. at 542, 100 S. Ct. 1349) (emphasis added).

Although the Federal Circuit in Pawnee found jurisdiction was proper, the Court upheld our rejection of the tribe's claim, ruling that the plaintiffs had failed to allege a specific violation of any of the duties imposed by statute or regulation. In doing so the Federal Circuit specifically refused to recognize a fiduciary obligation beyond that which springs directly from the pertinent statutes and regulations. *Pawnee*, 830 F.2d at 191-92.

The Navajo Nation's complaint suffers from the same shortcoming. Alleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision. For instance, the Navajo Nation has aptly demonstrated that the Secretary did not act as a proper trustee. But the Navajo fail to demonstrate a "breach of a specific duty that the regulations squarely place on the Secretary." *Brown*, 86 F.3d at 1563.

While the statute provides in general terms for the Secretary to maximize revenues and foster Indian self-determination, neither IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal. In *Pawnee*, the trust responsibility was specifically tied to obligations—both statutory, 30 U.S.C. §§ 1701-57, and regulatory, 25 C.F.R. §§ 212.4, 212.12, 212.14, 212.16—respecting oil and gas royalty management, yet the complaint still failed. 830 F.2d at 189-90.

The Navajo Nation cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process. It is also quite apparent that IMLA does not involve the Secretary, even moderately, in every stage of the coal leasing process. In our case, the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*:

> the royalty provisions of this Lease are subject to *reasonable adjustment* by the Secretary of the Interior or his authorized representative at the end of 20 years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

Article VI, Lease 8580 (emphasis added).

Other coal owned jointly by the Navajo and Hopi tribes was mined under leases (Navajo Lease 9910 and Hopi Lease 5743) with no royalty adjustment clause, and thus provided no occasion for Secretarial action on those royalty rates. By its very terms, the Navajo Nation lease did not call for a royalty rate adjustment until twenty years after its execution, and subsequent adjustments only every ten years. Even then, the

Secretary's only guidance was to be "reasonable" in revising rates.

The plaintiff notes that as a matter of policy, DOI would not approve coal leases with royalties less than those the trustee would receive for its own coal—at that time and now, apparently, 12.5 percent. But even under that policy, the Secretary's obligations are limited to the approval of royalty provisions at specific junctures during a lease's life, which now is limited to ten years. Nowhere does that policy, nor any other policy, impose an affirmative duty to interject government-dictated royalty rates. I Pl. App. 183-84. And, of course, there is no claim by the Navajo Nation that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy.

It is perhaps unnecessary to note that we do not view *Mitchell II* as the threshold level of Secretarial management required to invoke our jurisdiction over these claims. *See Brown*, 86 F.3d at 1559 n. 6 (trial court appeared to have misapplied *Mitchell II* transforming "the descriptive into the prescriptive."). We find that the Secretary's role in the Navajo's coal leasing—that is, his control or supervision of coal leasing—falls far short of the detailed fiduciary responsibilities of *Mitchell II*, *Pawnee*, and *Brown*, on the one hand, and is more akin to the general fiduciary responsibilities addressed in *Mitchell I* and *Wright*, on the other. And even if we were to find otherwise, the Navajo Nation has not alleged a breach of a specific trustee duty.

Breach of Contract Claim

In its second claim for relief, plaintiff alleges that Lease 8580 constitutes a valid contract or contract-implied-in-fact between the United States and the

Navajo Nation respecting the adjustment of the royalty. The Navajo further allege that this contract was breached when the government approved lease amendments which failed to adjust the royalties to a reasonable level, twenty percent being that level. In evaluating this claim for relief we look not to trust duties, or duties imposed by treaty, statute, regulation, or policy. Rather we search the record for evidence of an independent contractual obligation assumed by the Secretary in Lease 8580. We find none.

We note at the outset that although the issue is ripe for decision, plaintiff has not moved for summary judgment on its second claim for relief; the government, however, has done so in its cross-motion. Initially, the breach of contract claim was not briefed sufficiently. At the oral argument on the breach of trust claim, the Court requested briefs on the merits of the breach of contract claim and later heard oral argument.

The government offers five reasons for judgment as a matter of law: (1) The Secretary is not a party to the lease; (2) the lease's authorization to adjust the royalty rate does not amount to a binding contractual obligation; (3) the Secretary fulfilled any contractual obligation when Mr. Dodge first adjusted the royalty to twenty percent; (4) the decision adjusting the royalty was vacated at the Navajo Nation's request when it sought approval of the negotiated rate; and (5) the contract claim is barred by the statute of limitations. We have already rejected the statute of limitations argument in relation to the first claim for relief, and we do so again for the reasons previously stated.

Except for the first two arguments, the government's grounds for summary judgment in large part go to the issue of breach. We do not reach that issue

because we find as a matter of law that the government owed no contractual obligation toward the Navajo Nation. In order for a contract, whether express or implied, to be binding upon a party we must find mutual intent to contract demonstrated by an unambiguous offer, acceptance, and consideration. *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). These elements are not present. We find no intent on the part of the Secretary to assume a contractual obligation, and we find no consideration—both essential to the formation of a written or an implied contract.

Contract Formation and Lease 8580

Lease 8580 was executed by the Chairman of the Navajo Tribal Council and the Vice President of Sentry Royalty Company, Peabody's predecessor in interest. The terms of the lease clearly designate the tribe as lessor and Sentry as lessee. Plaintiff relies on explicit provisions within the lease, primarily Article VI, to hold the government contractually bound. Article VI is entitled "Termination of Federal Jurisdiction." The pertinent clause simply made the royalty provisions of Lease 8580 "subject reasonable adjustment" by the Secretary at various infrequent junctures (at the twenty-year mark and every ten years thereafter) during the life of the lease. It does not by its terms suggest a contractual obligation.

The remaining lease provisions present an even less compelling case for the assumption of contractual liability. In fact, one can highlight every reference to the Secretary and arrive at the same conclusion—the language of the contract does no more than confirm the Secretary's role under IMLA. *See* Lease 8580, Art. VIII (when permitted by law and with the concurrence

of the Navajo, Secretary may suspend mining operations in the event of unsatisfactory economic conditions or inadequate marketing facilities); Article XI (prohibiting assignment of the leasehold interest by the lessee without the prior approval of the Secretary and the Navajo); Articles XVI and XXIV (authorizing the Secretary to nullify lease in the event lessee fails to comply with its covenants or uses the property for unlawful conduct); and Article XIII (providing that leasehold property and lessee's accounts "shall be open at all times for inspection by agents of Lessor or any duly authorized representative of the Secretary of Interior.") While Article VI and the remaining provisions cited by the Navajo Nation call for Secretarial involvement in various aspects of the administration of the lease, nothing in those provisions makes the United States a party to that contract.

In 1964, the Assistant Area Director of the Bureau of Indian Affairs approved the lease that had been executed by Navajo and Sentry. This approval, like the approval 23 years later of the lease amendments, was no more than the fulfilment of the Secretary's statutory duties, and evidenced no intent to contract. Defendant makes this very point, relying upon language in both *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372, 88 S. Ct. 982, 19 L. Ed. 2d 1238 (1968), and *United Nuclear Corp. v. Clark*, 584 F. Supp. 107, 108 (D.D.C. 1984), restricting the Secretary's ability unilaterally to enter into a mineral lease or extend its terms. The rationale for the restrictions was the same in both instances—the Secretary was not the lessor, notwithstanding the fact that Secretarial approval was required. *Poafpybitty*, 390 U.S. at 372, 88 S. Ct. 982.

When the Secretary reviews and approves mineral leases as part of his statutory responsibilities, he does not become a lessor or a lessee. We believe this to be the general rule, absent specific statutory authority to the contrary. *See Poafpybitty and United Nuclear Corp., supra*; *see also, Sangre de Christo Devel. Corp. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991) (statute providing for approval of Indian lease "is no different than many other federal statutes that require federal approval of private agreements"), *cert. denied*, 503 U.S. 1004, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992). We are unaware of any authority to the contrary, and plaintiff has not pointed us to any.

Consideration

Even were there an intent to assume a contractual obligation, there still must be consideration—a bargained for exchange—in order to create a contractual obligation. *See generally*, RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS §§ 71-81 (1981). The lease clearly sets out the "consideration" supporting the agreement at the beginning of the instrument. Lease 8580, Article I ("Consideration"). The paragraph identifies an exchange of benefits between the lessor and lessee, but makes no mention of the United States. By its terms, the lease suggests no benefit flowing to the United States.

In an effort to demonstrate consideration enuring to the government's benefit, plaintiff sets forth facts which are not in dispute, but which we do not find compelling: First, that public utilities rely solely on the lessee's coal-mining operations; and second, that the United States Bureau of Reclamation owns a 24.5 percent beneficial interest in one of the utilities relying on the Navajo coal. Plaintiff would have us take notice

that increases in the royalties paid the Navajo will be borne by the utilities and consumers. *See* Plaintiff's Summary of Facts Relating to Contract Claim. This is not particularly relevant to the issue of consideration, but the inference tends to demonstrate a potential conflict of interests on the part of the government.

A reasonable inference can be drawn that the Secretary of the Interior derived some intangible benefit in the continued execution of the Lease 8580. We grant that "[t]he 8580 Lease was and is one important part of a larger initiative to provide electricity and water to the American Southwest by the United States Bureau of Reclamation and the owners of the Mojave and [Navajo Generating Station] plants . . .". Consolidated Statement of Proposed Uncontroverted Facts. One could conclude that the Secretary's role in enforcing the covenants of the lease and in ensuring a reasonable royalty rate confers the public benefit of sustaining the energy needs of the region. And to the extent the lease provided economic benefits to the Navajo, the Secretary's obligations to that Indian community were also furthered. This does not carry the argument, however. These objectives fall well within the ambit of the Secretary's executive responsibilities. They do not demonstrate independent consideration supporting the government's "promise" to adjust rates.

Contract Implied-in-Fact

In its First Amended Complaint the Navajo Nation pled alternatively that the lease gave rise to a contract implied-in-fact. Such a contract may spring from the Navajo Nation's recourse to the rate-setting mechanism and the government's assumption of the responsibility to set a revised rate. Under this implied

contract theory, once the Secretary assumed the responsibility to adjust the royalty provisions of Lease 8580, he was required to act in good faith and with fairness to all parties. According to plaintiff this covenant of good faith and fair dealing "require[d] that any discretion granted the Government under Article VI be exercised reasonably." Pl. Opp. (Count II) at 9.

But we must first find the existence of an implied-in-fact contract binding the government. Plaintiff insists that such a contract may be found in the words and actions of the Navajo Nation and the United States. We disagree. For the government to be considered a party to a contract implied-in-fact we must find mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance—the same elements required for a written or express contract—and conduct by a government representative with actual authority to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. den'd* 501 U.S. 1230, 111 S. Ct. 2851, 115 L. Ed. 2d 1019 (1991) (citations omitted); *see also Vines v. United States*, 30 Fed. Cl. 711, 714 (1994) ("the facts and circumstances of the case must show that 'the parties have taken upon themselves corresponding obligations and liabilities and have come to a meeting of [the] minds.'") (quoting *Commonwealth of Kentucky v. United States*, 27 Fed.Cl. 173, 176 (1992)). On the evidence before us, each of these elements fails for the very same reasons we have enunciated regarding plaintiff's express contract theory. If, as we have found, Lease 8580 does not create a contractual obligation on the part of the Secretary, we are at a loss as to how the Secretary's assumption of the rate-revision function and then his abandonment of that function, plus his later approval of

the amendments, create a contractual obligation. The Navajo Nation has not demonstrated how the implementation of a non-contractual function creates a contractual obligation.

In conclusion, we find plaintiff's claim of breach of contract lacking in at least three respects: The Secretary's approval of the 1964 lease with the Article VI provision for subsequent adjustment was based on his statutory responsibilities and evidenced no intent to assume a contractual obligation; there was no consideration to support an agreement by the government; and the assumption of the rate-setting function of Article VI created no contractual obligation.

CONCLUSION

The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty—a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. Defendant has thus established its right to judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication.

Accordingly, defendant's motions for summary judgement with respect to plaintiff's breach of trust claim and its breach of contract claim are GRANTED. The Clerk of Court is directed to enter judgment for defendant and dismiss plaintiff's First Amended Complaint.

APPENDIX

TO: John W. Fritz

FROM: Don Hodel

RE: Appeal of Navajo Area Director's Adjustment Of Royalty, Lease No. 14-20-0603-8580

I have reviewed the attached letter from Mr. C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late 1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5

percent which is currently required on surface coal mining leases on federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal, therefore, a decision on the appeal at this time would be ill-timed. I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

MEMORANDUM FOR: JOHN FRITZ

FROM: DONALD PAUL HODEL

SUBJECT: APPEAL OF NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY LEASE NO. 14-20-0603-8580

I have reviewed the enclosed letter from C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the

subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late-1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on Federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma. I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal; therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of

the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 00-5086

THE NAVAJO NATION, PLAINTIFF-APPELLANT

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Dec. 12, 2001]

JUDGMENT

ON APPEAL from the United States Court of FederalClaims

In CASE NO(S). 93-CV-763

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: REVERSED AND REMAND

ENTERED BY ORDER OF THE COURT

DATE: AUG 10, 2001 JAN HORBALY
JAN HORBALY, Clerk

ISSUED AS A MANDATE: NOVEMBER 23, 2001

Costs Against Appellee:
Printing $4,162.88
Total $4,162.88

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

THE NAVAJO NATION

v.

THE UNITED STATES

[Filed: Feb. 1, 2000]

JUDGMENT

Pursuant to the court's Published Opinion, filed February 4, 2002,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of the defendant and the First Amended Complaint is dismissed.

Margaret M. Earnest
Clerk of Court

February 4, 2000 By: LISA L. MOFADE
LISA L. MOFADE
Deputy Clerk\

NOTE: As to appeal, 60 days form this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX E

MINING LEASE
CONTRACT NO. 14-20-0603-8580
Between
SENTRY ROYALTY COMPANY AND THE NAVAJO TRIBE

THIS INDENTURE OF LEASE made and entered into in sextuplicate effective the 1st day of February, 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor," and the SENTRY ROYALTY COMPANY, a Nevada corporation with offices at 301 North Memorial Drive, St. Louis, Missouri 63102, herein designated as "Lessee."

WITNESSETH:

* * * * *

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In the event Federal jurisdiction shall have been terminated and the royalty provisions are subject to negotiation as provided in this section, within ten days after the request of either Lessor or Lessee for submission to arbitration, Lessee shall name one arbitrator and Lessor shall name one arbitrator, and the two named shall select within ten days next ensuing a third arbitrator. In the event the two arbitrators named by the parties cannot agree upon a third arbitrator, then any Judge of a United States District Court for the District of Arizona may select the third arbitrator. In determining the royalty provisions, the arbitrators shall consider all pertinent evidence to establish the value of coal and shall fix a royalty fair to both Lessor and Lessee under the circumstances existing at the time of such arbitration.

* * * * *

AMENDMENTS TO COAL MINING LEASE

NO. 14-20-0603-8680

BETWEEN THE NAVAJO TRIBE AND PEABODY COAL COMPANY

[Received Dec. 30. 1987]

* * * * *

4. Adjusted Royalty Payment. Article VI, entitled Termination of Federal Jurisdiction, p. 7-8, is deleted from the Lease and the following is substituted:

VI. Adjusted Royalty Payment

Lessor and Lessee recognize that a dispute has arisen between them with regard to the validity and reasonableness of the royalty adjustment decision of the Bureau of Indian Affairs Navajo Area Director dated June 18, 1984, which decision was purported to be made pursuant to Article VI of the original terms of this Lease No. 14-20-0603-8580. Such decision is currently on appeal by Lessee before the Assistant Secretary of the Interior for Indian Affairs.

(a) In consideration of the benefits associated with these lease amendments, as well as those associated with amendments to Lease No. 14-20-0603-9910, Lessor and Lessee hereby jointly move that the royalty adjustment decision of the BIA Navajo Area Director dated June 18, 1984, pertaining to this Lease be vacated and declared to be of no force or effect and, by approving these lease amendments, the Secretary of the Interior does hereby vacate that royalty adjustment decision

and render that royalty adjustment decision to be without legal force or effect.

(b) Upon the approval of these amendments by the Secretary of the Interior, the provisions of Article IV and VI of these lease amendments shall be the sole and exclusive method for the determination or readjustment of royalty rates under Lease No. 14-20-0603-8580 for periods beginning on and after February 1, 1984.

(c) For all coal obtained from the premises leased under this Lease during the period February 1, 1984, until the effective date of these amendments, Lessee shall pay Lessor twelve and one-half percent (12.5%) of the gross realization received by Lessee for such coal, with gross realization computed in accordance with the method utilized at the time the coal was sold for computing royalties on federal coal leases. The payment under this subparagraph (c) shall be due and payable within ten (10) calendar days of the effective date of these amendments. For purposes of Article XXXV herein such payments shall be allocated so that payment shall be deemed to be made in the year in which the coal was sold.

(d) For the payments described in subparagraph (c) above and other good and valuable consideration contained in this Lease as herein amended, Lessor agrees not to assert any claim or other demand for any amounts as past due royalty under this Lease for the period February 1, 1984, to the effective date of these lease amendments or interest thereon, except that nothing in this provision shall relieve Lessee from the obligation to pay any additional amounts determined tobe due to Lessor under subparagraph (c) above after audit or review of Lessee's production and/or royalty data.

APPENDIX F

1. 28 U.S.C. Section 1491(a)(1) states in part:

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. 28 U.S.C. Section 1505 states:

§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Execution orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

Supreme Court, U.S.
FILED
MAY 3 2002
CLERK

(2)

No. 01-1375

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Federal statutes and regulations control virtually every aspect of surface coal mining on tribal lands, from the creation of leases, approval of mine plans, setting and administration of rentals and royalties, and supervision of reclamation activities, to final bond release. The basic purpose of the statutory scheme is to maximize tribal revenues from reservation lands. The question presented is:

Whether the Court of Appeals properly held that the United States may be liable in damages to the Navajo Nation when the Department of the Interior, in exercising its control over the leasing process, violated several specific trust duties imposed by the Indian Mineral Leasing Act and its implementing regulations and deliberately abused its comprehensive management authority to minimize Navajo revenues in favor of a politically powerful coal company with ties to the Secretary.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Navajo Nation respectfully urges that the Government's Petition be denied. The judgment below is entirely consistent with this Court's precedents, the lower courts are in harmony on the legal issues, and a decision on these facts would have no general applicability.

TREATY, STATUTES, AND REGULATIONS INVOLVED

The following treaty, statutes, and regulations reveal the comprehensive nature of federal control over the leasing of Navajo coal and provide the contours of the Government's trust duties: the Treaty between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849); the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, and implementing regulations, 25 C.F.R. Parts 211 and 216, Subpart A and 43 C.F.R. Part 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. Part 169; the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA requirements to Indian coal, 30 C.F.R. § 206.450 *et seq.* and 25 C.F.R. § 211.40 (applying 30 C.F.R. Parts 201-243, 290); section 710 of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. Part 216, Subpart B, and 30 C.F.R. Parts 750 and 955; and federal mine safety laws applicable to coal mining on tribal lands, 30 U.S.C. § 551 *et seq.* and 30 U.S.C. § 802 *et seq.*; *see* 30 C.F.R. Parts 50, 56, 71-72, 74, 77, 90, 100, 880. These provisions are set forth in the Addendum lodged

with the Court, except for the voluminous, generally applicable, mine safety laws and regulations.

STATEMENT OF THE CASE

This case involves a unique set of unrebutted facts. In 1964 the Department of the Interior negotiated, drafted, and approved a coal lease between the Navajo Tribe and a subsidiary of the Peabody Coal Company. The lease called for royalties of 20¢ to 37.5¢ per ton. C.A. App. A281. After Congress mandated in 1976 that royalties for federal coal equal or exceed 12½% of value, *see* 30 U.S.C. § 207(a), the Department recognized that the lease was inequitable and that it had a duty to rectify the inequity. *E.g.*, C.A. App. A364, A379. The lease itself offered that opportunity, granting the Secretary unilateral authority to adjust the royalty rate to a reasonable level in 1984. *Id.* at A284.

The Tribe engaged in fruitless negotiations with Peabody from 1979 to 1984. In early 1984, Tribal Chairman Peterson Zah requested the Secretary to adjust the royalty rate. *Id.* at A375. The Secretary delegated that responsibility to the Navajo Area Office of the Bureau of Indian Affairs ("BIA"). *Id.* at A379. The Navajo Area Director obtained analyses from the Bureau of Mines ("BOM") and the BIA Energy & Minerals Office ("E&M"). BOM recommended a royalty rate adjustment to 20%; E&M to 24%. *See id.* at A437. Relying on the lower BOM recommendation, the Area Director notified Peabody in June 1984 that he was adjusting the royalty rate to 20% and that Peabody had a right to appeal under the Department's formal appeal procedures. *Id.* at A438.

Peabody appealed to the Commissioner of Indian Affairs, then John Fritz, who also held the positions of Deputy Assistant Secretary and Acting Assistant Secretary for Indian Affairs. Fritz indefinitely stayed the royalty adjustment during the appeal, *id.* at A453, causing the Navajo to lose an estimated $50,000 per day while the appeal languished, *id.* at A397. Peabody and its utility customers instructed counsel to "proceed[ ] on maximum delay mode in the appeal." *Id.* at A452. The parties completed briefing in early 1985, and Fritz then obtained new, more detailed, studies from BOM and the BIA's own experts. *See id.* at A649-714. All federal studies determined that the 20% rate was proper, *see id.* at A714; no study found otherwise, *id.* at A1864.

Fritz sought to make his decision a model of procedural fairness and technical competence. *Id.* at A1230-32. Fritz, his staff, and his solicitor prepared a final decision for the Department, going over it line-by-line. *Id.* at A1245-46. The decision document was finalized, typed on BIA letterhead, copied, and checkmarked for distribution to counsel of record in the administrative appeal. *Id.* at A717-722. It was, in Fritz' words, "teed up" for his signature after he returned from military reserve duty. *Id.* at A1245.

The Department leaked the pending decision to Peabody, but not the Navajo. *E.g.*, *id.* at A1089-90; *see* Pet. App. 41a-42a. Peabody immediately hired Stanley Hulett, a "close personal friend" of Secretary Hodel, to seek *ex parte* the suppression of the decision. Pet. App. 40a. Then, "[o]n or shortly after the date of the *ex parte* meeting, Secretary Hodel signed a memorandum prepared by Peabody . . . instruct[ing] Mr. Fritz not to issue the appeal

decision affirming the twenty percent rate."[1] Pet. App. 40a-41a; C.A. App. A746-49, A764.

The Department immediately notified Peabody of the success of its *ex parte* campaign–both Hodel and Fritz met with Hulett at lease twice–but concealed it from the Navajo. *Id.* at A746; Pet. App. 41a, 46a. An Associate Solicitor discovered what Secretary Hodel had done and warned of various consequences if the Navajo learned the truth. C.A. App. A771-72. The Department then "misinformed" the Navajo. Pet. App. 41a. Because of the Department's dishonesty, "the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." Pet. App. 51a-52a.

Peabody reiterated its longstanding offer to raise the royalty rates for its coal leases to 12½% shortly thereafter. The Tribe rejected Peabody's offer in July 1986. *See* C.A. App. A929, A1041. However, during the two and one-half years of negotiations after Secretary Hodel secretly scuttled Fritz' decision, the Navajo continued to receive negligible royalties. The Department knew the Navajo would get "beat up" in the negotiations, *id.* at A1644, A1263-64; continued to conceal from the Navajo

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[1] The Government's claim that Hodel signed the memo prepared by Peabody's lawyers to "request" Fritz not to issue the decision, Pet. at 13, is euphemistic at best. As the former Director of the Office of Trust Responsibilities testified, "you would have to be brain dead not to understand what this is telling you." C.A. App. A1648. Similarly, notwithstanding the Government's attempt to find a regulation that might justify Hodel's actions, *see* Pet. at 7 n.4, 24, Hodel did not direct Fritz to "reconsider" his decision; rather, he secretly "assume[d] personal jurisdiction" over the case, and told Fritz to "stop action." C.A. App. at A1253.

both the *ex parte* deal and the new federal studies supporting the 20% royalty rate, *see id.* at A784, A1026-27, A1283-84; and violated its own regulation designed to prevent overreaching by companies negotiating with Indians. *See* 25 C.F.R. § 211.2 (1985) (prohibiting mineral lease negotiations unless desired by the Indians and generally restricting any negotiations to thirty days); C.A. App. A839. Instead, the Department actively assisted *Peabody* in *its* negotiation strategy. *See id.* at A778.

Predictably, facing "severe economic pressures," Pet. App. 3a, the Navajo eventually agreed to Peabody's proposal reducing the effective royalty rate to even less than the federal minimum.[2] Moreover, contrary to the Government's assertion, Pet. at 7-8, other provisions of the "negotiated" lease amendments substantially harmed Navajo interests. For example, the amendments eliminated the "extremely valuable" provision for future Secretarial adjustment, *see id.* at A800-01 (abrogating Article VI of the original lease), A988; required the Navajo to forfeit $89 million in back royalties and taxes,[3] Pet. App. 44a; capped future taxes, confirmed old tax waivers[4] and

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[2] Contrary to the Government's representations, accepted by the Court of Federal Claims, *see* Pet. at 11, the Navajo Nation alleged and proved on unrebutted facts that the effective royalty rate of the "negotiated" lease amendments was less than the federal minimum of 12½%. C.A. App. A107, A120, A124, A1973, A2058, A2796.

[3] The Department knew that the Navajo "gave up something for nothing" here. C.A. App. A2865.

[4] Because of a pre-existing tax waiver on coal destined for the Navajo Generating Station, which consumes over half of the Peabody coal, the *total* of Navajo taxes and royalties for that coal cannot exceed 12½% under the lease amendments, much less

granted new tax waivers, C.A. App. A805-10; and leased an additional 90 million tons of Navajo coal for insubstantial bonuses and at the facial 12½% royalty rate, not the 20% rate that all federal studies had found reasonable, *id.* at A795, A1550-52, A1857. The Government notes that the royalty rate of a second inequitable lease of coal jointly owned by the Navajo and Hopi was also adjusted to 12½%, Pet. at 8, but the amendments to that lease only damaged the Navajo further. As Peabody and its customers recognized, if the 20% rate were affirmed for the Navajo lease, the royalty rate of the other lease would inevitably rise to that figure. *See id.* at A740; A1072-73. Ironically, at the same time the Department was working with Peabody to minimize Navajo royalties below the 12½% federal minimum, it required Peabody to pay a 17.08% royalty for inferior federal coal. *Peabody Coal Co.*, 93 IBLA 317 (1986).

Federal law requires that any tribal mineral lease be approved by the United States, to protect Indians from unfair transactions. The process required by IMLA for Secretarial approval therefore requires an economic analysis to determine if it were in the Tribe's best interest. However, Secretary Hodel had committed privately to Peabody to approve the deal without any economic analysis. C.A. App. A847. The approval process was thus described by the Director of the Office of Trust Responsibilities as follows: "And my shop, what are we doing? We can't help, because we are not supposed to help. . . . [I]f you tell me I can't respond as a Trustee, then what is my review? And that's why we have no review . . . [T]he

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approach the 20% figure found by the Department to be proper compensation for the coal alone. C.A. App. A1972-76.

way this happened was, we were rubber stamping a review of a bunch of [lease] amendments that we weren't supposed to review." *Id.* at A1659-61. The Director "refused to sign his approval because he felt he 'would be participating in a breach of trust.' " Pet. App. 45a (quoting deposition testimony).

Thus, Peabody submitted the lease amendments directly to Secretary Hodel's office, and their approval became a "rush job" within the Department. C.A. App. A1876. Hodel approved the lease amendments via a document partially drafted by Peabody, based on the recommendation of Assistant Secretary Ross Swimmer *also* drafted in part by Peabody. *Id.* at A1877-82. No economic analysis or study of any kind was included in the package sent to Hodel by Swimmer.[5] *Id.* at A2061, 2725.

From the exhaustive studies performed by the Bureau of Mines and others, the Department was well aware that the Navajo's extraordinarily valuable coal should have commanded a royalty rate of at least 20% and it had the opportunity to impose that rate at all times from 1984 to 1987. This case involves no Navajo "second-guess[ing]" and requires no "benefit of hindsight," as the Government suggests. Pet. at 18, 27. It concerns the intentional subversion of Navajo interests by its faithless trustee, which knew at the time it approved the sub-12½% deal that the proper royalty was at least 20%.

This suit was filed in 1993. Until the Government's first trial attorney was removed from this case after being found to have intentionally obstructed justice in another

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[5] A rushed "technical review" prepared by the BIA was shelved, its author having been given insufficient information to form a reasoned opinion. *See, e.g.*, C.A. App. A959, A963. Had the reviewer been informed of the facts, he would have recommended disapproval. *Id.* at A998-1006.

case involving Navajo coal, *see Mescal v. United States*, 161 F.R.D. 450 (D.N.M. 1995), the Government continued to conceal the facts even during discovery in the trial court in this case. The full extent of its misconduct was discovered only in 1997, when Peabody was forced to produce a document that *it* had concealed in violation of court orders and agreements of counsel. *See Navajo Nation v. United States*, 46 Fed. Cl. 353, 354 (2000), *aff'd*, 2001 WL 312117 (Fed. Cir. May 29, 2001).

DECISIONS BELOW

The Court of Federal Claims was outraged by the Department's conduct, but, focusing only on the Department's collusion with Peabody, held that it lacked jurisdiction to provide a remedy. "Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic duties [of loyalty, care, and candor]. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." Pet. App. 49a. The "formal outcome" was premised on the court's *sua sponte* determination that federal supervision over Indian coal was not comprehensive, contrary to the Government's repeated concession in that court. *See* C.A. App. A2108, A2986.

The Court of Appeals shared the trial court's outrage, *see* Pet. App. 11a-12a, but reversed on the "formal outcome." It found it "quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Pet. App.

10a. The Court of Appeals determined that such comprehensive supervision over all aspects of Indian coal leasing gives rise to a correlative federal duty to "manage the mineral resources for the benefit of the Indians." Pet. App. 11a.

The Court of Appeals further determined that the principal statutory purpose to be served by federal management of tribal minerals was to "maximize their benefit to the Indians," Pet. App. 10a, and that the familiar "best interest of the Indians" standard applies to the Departmental actions at issue here. *See* Pet. App. 12a. Having determined that the United States controls and supervises virtually every aspect of Indian coal development and that the Government has a statutory duty to exercise its pervasive control to manage tribal minerals in a way that maximizes revenues and advances Indian interests, the Court of Appeals concluded that "[IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*," *United States v. Mitchell*, 463 U.S. 206 (1983). Pet. App. 8a.

The Court of Appeals therefore applied the *Mitchell II* framework. It found that all of the Department's revenue-minimizing activities, from its secret collaboration with Peabody in scuttling a well-supported administrative appeal decision to its rubber-stamp approval of the damaging lease amendments two and one-half years later violated both "common law . . . [and] statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo." Pet. App. 12a.

In a separate opinion, Judge Schall agreed that the Government violated compensable fiduciary duties, but focused on the Secretary's approval of the "negotiated"

lease amendments.[6] In Judge Schall's opinion, the Department's "failure to perform an economic analysis on the Agreement between Peabody and the [Navajo] Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 . . . amounted to a breach of a fiduciary obligation owed to the Nation." Pet. App. 30a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH *MITCHELL II*.

a. *Mitchell*'s "Control or Supervision" Test

Mitchell II approved the general test stated in *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980), for determining if money-mandating trust duties may exist: " 'where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' " 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987). The Government would apparently substitute an undefined "management" test derived from dictum in *Mitchell I* for the "control or supervision" test actually approved by this Court in *Mitchell II*. *See* Pet. at 17-19.

The Indian plaintiffs in *Mitchell II* sought to recover damages from the United States based on allegations of waste and mismanagement of their timber resources.

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[6] The Government's repeated references to a "divided" court of appeals are misleading. All judges on the panel agreed that jurisdiction was present and that the Department had breached compensable trust duties.

They asserted that the alleged misconduct constituted a breach of fiduciary duty owed them by the United States under various statutes. 463 U.S. at 210. To prevail, the plaintiffs were required to show that the source of substantive law on which they relied–the statutes and regulations under which the United States controlled or supervised the timber resource–could fairly be interpreted as mandating compensation by the Federal Government for damages sustained as a result of a breach of the duties they impose. *Id.* at 219.

The Court examined the timber management statutes, 25 U.S.C. §§ 406, 407, 466, the Indian right-of-way statutes, and implementing regulations–the sources of substantive law on which the plaintiffs relied. *Mitchell II*, 463 U.S. at 219-23. It found that they conferred federal control over "[v]irtually every stage of the process," *id.* at 222, and established a correlative federal "responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary obligations." *Id.* at 224. The Court concluded that, because those "statutes and regulations . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation for damages sustained." *Id.* at 226.

In its Petition, the Government urges both that the governing statutes and regulations must expressly impose "fiduciary *management* duties" in order to create potential liability under *Mitchell II*. Pet. at 21 (emphasis in original). The Government's contention ignores the disjunctive "control or supervision" test adopted in *Mitchell II*, 463 U.S. at 225, and improperly transforms "the

descriptive into the prescriptive." *Brown v. United States*, 86 F.3d 1554, 1559-60 n.6 (Fed. Cir. 1996). As *Brown* explained, "[a]ccording to [*Mitchell II*'s] disjunctive 'control or supervision' test, nearly complete government management (*i.e.*, 'supervision') or control, while more than sufficient to create an enforceable duty, is not necessary." *Id.* at 1560 (citations omitted). The Government's seeming insistence on violations of statutes and regulations that provide a money damage remedy *in haec verba* overlooks the careful wording of *Mitchell II*: the applicable statutes and regulations provide the "contours" of the trust duty. 463 U.S. at 224. While the general contours of the government's obligations may be defined by statute, the interstices are filled in through general trust law.

b. Federal Control or Supervision of Indian Coal Leasing

The Navajo Nation alleged, *e.g.*, C.A. App. A38-39, A117-18, and the Government conceded comprehensive federal control and supervision over Indian minerals in both of its briefs in the Court of Federal Claims.[7]

[7] C.A. App. A2108 ("the Department of the Interior has promulgated comprehensive regulations governing the operation of approved leases–including regulations governing rights-of-way over Indian lands, 25 C.F.R. Part 169 (1985); surface exploration, mining operations and reclamation, 25 C.F.R. Parts 216 (1985) and 200 (1993); and the payment of rents and royalties, 25 C.F.R. Part 211 (1985)"); C.A. App. A2986 ("the Secretary's duties in the administration of mineral leases are admittedly quite comprehensive . . . ").

Inexplicably, that court, *sua sponte*, found that comprehensive federal control of Indian coal was lacking. This *sua sponte* utterance is the only support the Government can muster for its position here that the United States controls or supervises Indian minerals less comprehensively than it does Indian timber. *See* Pet. at 20. The Court of Appeals corrected the Court of Federal Claims on this point. The Government's concession of jurisdictional facts in the Court of Federal Claims, *see supra* n.7, and its express concession in the Court of Appeals that "there is no question that the CFC had subject matter jurisdiction" over this case, Gov. Br. at 2, belie its new position here, that this case "presents a threshold immunity question." Pet. at 14.

Congress has delegated to several federal agencies the power to regulate all aspects of Indian coal leasing and development. These agencies exercise literally daily supervision of all such mining activities.

• *Bureau of Indian Affairs ("BIA")* Congress expressly delegated rulemaking authority to the Secretary in IMLA. 25 U.S.C. § 396d. The Secretary's regulations comprehensively govern coal exploration permits, lease negotiations, bonding, the size and shape of leases, specific terms of mineral leases, approval or disapproval of leases and mining plans, rental and royalty payments, permission to commence mining operations, promulgation and enforcement of "operating regulations" by the Secretary, penalties for noncompliance with provisions of leases and regulations, and lease cancellation. 25 C.F.R. Parts 211 and 216, Subpart A. Pet. App. 9a-10a; C.A. App. A3393.

The IMLA regulations were expressly promulgated to ensure that Indian mineral resources "will be developed in a manner that maximizes their best economic interests" and to be "consistent with the *Federal Government's role as trustee* for these mineral resources and with the modern Federal policy of self-determination." 61 Fed. Reg. 35,634 (1996) (emphasis added). The BIA exercises further control over coal mining operations through authority over rights-of-way. 25 U.S.C. §§ 323-328; 25 C.F.R. Part 169; *see Mitchell II*, 463 U.S. at 223.

• *Bureau of Land Management ("BLM")* IMLA regulations delegate to BLM comprehensive authority over resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification for Indian coal, and incorporate by reference BLM regulations governing coal exploration and mining operations. 25 C.F.R. § 211.4, incorporating 43 C.F.R. Part 3480. In performing these functions, BLM exercises "the *trust responsibility of the United States*." *See* 61 Fed. Reg. 35,634, 35,641 (1996) (emphasis added).

• *Minerals Management Service ("MMS")* In the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757 ("FOGRMA"), Congress required the Secretary to address "the adequacy of royalty management for coal . . . on . . . Indian lands." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes. The Secretary satisfied the congressional mandate by establishing the Auditing and Financial System in 30 C.F.R. Parts 212 and 218, *see* 49 Fed. Reg. 37,336 (1984), and applying it to solid minerals retroactive to June 1985, *see* 51 Fed. Reg. 15,763, 15,765 (1986); and by adopting the Production Auditing and Accounting System in 30 C.F.R. Part 216, *see* 51 Fed. Reg.

8,168 (1986), under which MMS controls or supervises all aspects of coal valuation and the collection and audit of royalties, *see* C.A. App. A3393. The royalty management regulations were *also* expressly promulgated "to ensure that the *trust responsibilities of the United States* are discharged in accordance with the requirements of the governing leasing laws, treaties, and lease terms." 30 C.F.R. § 206.450(d) (emphasis added).[8]

• *Office of Surface Mining Reclamation and Enforcement ("OSM")* In the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), Congress reaffirmed federal control over Indian coal mining and lease amendments. 30 U.S.C. § 1300. Under regulations promulgated under SMCRA in 1977, OSM issues or denies mining permits on Indian land and oversees compliance by coal operators with requirements concerning post-mining land use, backfilling and grading, spoil disposal, topsoil handling, protection of hydrologic systems, dams and impoundments, revegetation and steep-slope mining. C.A. App. A3393; 25 C.F.R. Part 216, Subpart B (1985). Under additional Indian lands regulations promulgated under SMCRA in 1984, OSM comprehensively regulates permit applications and permitting decisions, exploration, performance standards, bonding, inspections, and enforcement of permit conditions, performance standards, and

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[8] The Government's suggestion, Pet. at 21, that it might have leased Navajo coal for the 10¢ per ton minimum set by a 1957 regulation even if it were aware (as here) that the proper royalty was closer to $4.00 per ton is preposterous. The United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate," to strive for the "ceiling" and not settle for the "floor." *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).

reclamation requirements. 30 C.F.R. Part 750; C.A. App. A3393. The regulations governing surface coal mining on tribal lands were *also* promulgated to satisfy "the *Department's legal role as trustee* of the natural resources of the Indian tribes." 42 Fed. Reg. 18,083 (1977) (emphasis added). Since 1994, OSM has also administered on Indian lands the provisions of the Coal-Mine Fire Control Act of 1954, 30 U.S.C. §§ 551-558, applicable only to "lands owned or controlled by the United States or any of its agencies." 30 U.S.C. § 554(a). *See* 30 C.F.R. Part 880.

Other federal agencies, such as the Office of Mine Safety and Health Administration and the Environmental Protection Agency, comprehensively regulate coal surface mining operations on Indian lands under more generally applicable laws. *See* C.A. App. A3394.

Even without the special overlay of rules governing Indian coal royalty management and Indian surface coal mining, this Court has observed that IMLA confers comprehensive federal authority over Indian minerals. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) (under IMLA, "the United States has exercised its supervisory authority over oil and gas leases[9] in considerable detail"). In invalidating certain state taxes on mineral production in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court likewise observed that IMLA was "comprehensive legislation" which "detailed uniform leasing procedures designed to protect the Indians." *Id.* at

[9] The unrebutted record here shows that the Government's supervisory control over Indian coal is *more* comprehensive than that over oil and gas. C.A. App. A3392-95.

763. The lower courts are in accord, including one that has scrutinized the mining operation at issue here. *See Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (federal "statutes and regulations govern[ ] virtually every aspect of [Peabody's] coal mining activities, from the creation of its leases to the reclamation of land"). Similarly, in holding that the Department breached trust duties under IMLA by rubber-stamp approvals of well spacing orders, the court in *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv.*, 792 F.2d 782 (9th Cir. 1986), relied on the fact that IMLA "is a detailed and comprehensive act that imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of Indians." *Id.* at 794. It relied on the *en banc* decision of the Tenth Circuit in *Jicarilla Apache Tribe v. Supron Energy Corp.*,[10] which held that the Department had violated trust duties under IMLA by failing to invoke a lease provision that would have resulted in greater royalties to the tribe than an alternative set of regulations. In so deciding, the *Supron* court found that, under IMLA, "the federal government's role in mineral leasing is pervasive and its responsibilities comprehensive," 728 F.2d at 1564, and that IMLA "regulations detail in exhausting thoroughness the government's management and regulatory responsibilities," *id.* at 1565.

As in *Mitchell II*, both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians. *See* 25 U.S.C. § 396b, 25

[10] 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring and dissenting), *on reh'g*, 782 F.2d 855 (*en banc*) (adopting concurring and dissenting opinion as modified), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986).

C.F.R. §§ 211.1(a), 211.3 (2001); *see Blackfeet Tribe*, 471 U.S. at 764 (IMLA's "leasing procedures [are] designed to protect the Indians."); *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982);[11] *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The Department's Indian coal leasing policy, adopted in 1975, also expressly requires it to act in the best interest of the Indians. C.A. App. A332.

Even if the Court were to adopt the novel "full management" test proposed by Petitioner, the IMLA regime would plainly satisfy it. The courts uniformly agree with the court below, Pet. App. 10a, that IMLA *does* impose management duties on the Federal Government, in addition to other duties expressly set forth in particular provisions of IMLA and its implementing regulations. For example, the court in *Kenai* invalidated a Departmental approval decision not in the interest of the Indians, reasoning that, as trustee under IMLA, the Secretary "must *manage* Indian lands so as to make them profitable for the Indians." 671 F.2d at 386 (emphasis added). Similarly, *Assiniboine* "conclude[d] that a fiduciary duty exists in the *management* of tribal mineral resources." 792 F.2d at 794 (emphasis added).[12] The lower courts are also in

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[11] *Kenai* held that the Department must "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands." 671 F.2d at 387. The *Kenai* standard was expressly adopted in the IMLA regulations, 61 Fed. Reg. 35,634, 35,640 (1996), and it applies to lease approval decisions, 25 C.F.R. § 211.3.

[12] *Accord Woods Petrol. Corp. v. Dep't of Interior*, 47 F.3d 1032, 1038 (10th Cir.) (*en banc*), *cert. denied*, 506 U.S. 808 (1995); *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 238 (1985).

agreement with the court below, Pet. App. 8a, that the IMLA scheme is the legal analog in the mineral context to the timber management regime in *Mitchell II*. *Supron*, 728 F.2d at 1564 ("the statutory and regulatory scheme in *Mitchell II* parallels that involved here"); *Pawnee*, 830 F.2d at 190 (analyzing Indian mineral leasing statutes and regulations, and concluding that "[t]his case is very much like . . . *Mitchell II*."); *Assiniboine*, 792 F.2d at 794; *Youngbull v. United States*, No. 31-88L, 17 Indian L. Rptr. 4001, 4005 (Cl. Ct. 1990) ("In many respects, the case at bar [concerning federal liability for improper IMLA approval decision] parallels the *Mitchell* cases. Both deal with the government's management of Indian resources. Both feature elaborate federal statutory and regulatory schemes governing disposition of Indian resources.") (Rader, J.).

The Government suggests that its management duties are not money-mandating because IMLA's primary goal, to maximize tribal lease revenues, cannot be given "talismanic effect." Pet. at 18 (quoting *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 179 (1989)). However, *Cotton* concerned a state's taxing authority, and "[i]mportant considerations of federalism took precedence over the Secretary's general duty to act on behalf of the tribe." *Burlington Resources Oil and Gas v. Dep't of the Interior*, 21 F. Supp. 2d 1, 4 (D.D.C. 1998). No such principles of federalism are present here, and, absent that circumstance, all authorities (including the Department's own Board of Land Appeals) agree that IMLA's "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).[13] In any event, the Navajo Nation's

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[13] *Accord Supron*, 728 F.2d at 1570; *Kenai* 671 F.2d at 386; *Dawn Mining Co. v. Watt*, 543 F. Supp. 841, 843 n.8 (D.D.C. 1982);

claim does not depend on giving the goal of maximizing lease revenues "talismanic effect"; the Government's conduct subverted IMLA's basic purpose in a most extraordinary and substantial way.

c. The "Causal Link"

The Government's contention that the Navajo Nation here did not allege or prove "the breach of any specific duties imposed by the statutes or regulations giving rise to [the trust] relationship," referred to by the Government as the "requisite causal link," Pet. at 23, simply misstates the record. The Navajo Nation alleged the violation of specific trust duties in the approval of the lease amendments and the events leading to that approval, C.A. App. A35-41, and demonstrated with an unrebutted factual record that the Department violated the following "specific" trust duties imposed by IMLA and its implementing regulations. The Department:

- exercised its approval power under 25 U.S.C. § 396a with no examination of the merits of the transaction or the Navajo's best interests, *see* Pet. App. 26a-27a;
- violated 25 C.F.R. § 211.2 (1985) by compelling the Navajo to negotiate, and by failing to limit and supervise the negotiations;[14]

Burlington Resources Oil and Gas Co., 151 IBLA 144, 156 (1999); *General Crude Oil*, 18 IBLA 326, 329 (1975).

[14] That regulation allowed mineral lease negotiations only if the Indian, not the developer, sought them and required that negotiations generally be concluded in thirty days. C.A. App. A195. The regulation "is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources." Pet. App. 57a. Here, Peabody sought to prolong the multi-year "negotiations"; the Navajo *opposed* them. *See, e.g.*, C.A. App. A462-A464, A468, A728-A729, A746, A750-A751, A766-A767. This regulatory violation was flagged by the Solicitor's Office and ignored in late 1987, prior to Secretary Hodel's rubber-stamp approval of the lease amendments. *See* C.A. App. A839.

- violated Congress' central purpose in establishing the IMLA trust by deliberately *minimizing* tribal revenues from the Navajo's most valuable, nonrenewable, resource;
- obtained for the trust beneficiary less consideration for its coal than the trustee itself requires for federal coal in violation of federal law, policy, and black letter trust standards;
- knowingly exercised its complete control over royalty adjustments under the lease to undermine Navajo interests, in violation of its IMLA duties[15] and in collusion with the adversary of the trust beneficiary, *see* C.A. App. A746;
- violated specific trust duties of care, loyalty,[16] and candor when operating within the "contours" of the IMLA statutory and regulatory scheme, *see* Pet. App. 11a-12a, 49a.

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[15] The Government seeks to excuse the obvious breach of trust in the Secretary's collusion with Peabody to suppress and conceal a favorable decision on Peabody's administrative appeal of the royalty rate adjustment by observing that that misconduct occurred in a formal administrative appeal governed by the Administrative Procedure Act, not by IMLA. Pet. at 23-24 & n.11. However, the Secretary, as trustee managing tribal minerals, "cannot escape his role as trustee by donning the mantle of administrator." *Supron*, 728 F.2d at 1567. Stated more generally, a "fiduciary cannot turn his responsibilities on and off like a faucet." *In re Diasonics Sec. Lit.*, 110 F.R.D. 570, 574 (D. Colo. 1986) (citations omitted).

[16] The Department's adherence to its duty of loyalty is especially important in its dealings with Indian tribes. *Felix S. Cohen's Handbook of Federal Indian Law* 227-28 (1982); *see generally N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981).

The Court of Appeals had no trouble finding a "causal link," *see* Pet. at 23, between the Department's intentional mismanagement of Navajo coal resources and the damages sustained by the Navajo. *See* Pet. App. 3a, 11a-12a. The Department foresaw the damage to Navajo interests at the time Secretary Hodel suppressed and concealed the well-reasoned Fritz decision, misled the Navajo, and forced the Navajo to negotiate while under severe economic pressures. Asked about a statement in the instruction memorandum drafted by Peabody's lawyers and signed by Hodel that "there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate," Acting Assistant Secretary Fritz testified: "[t]o everybody other than the Navajo Nation there would be significant advantages, candidly." C.A. App. A1263-64. As the Director of the Office of Trust Responsibilities testified, Hodel instructed Fritz to "don't act, and put these people at arm's length; but I didn't think that that was appropriate . . . I thought that the proper standard for a Trustee is to put your arm around your beneficiary, and together you try to work out a good result. Not to throw them out there and let them get beat up, and then if they are still alive, resuscitate them." C.A. App. A1643-44.

Judge Schall's narrower rationale, that the Secretary's approval of the lease amendments with no economic evaluation violated his trust duties under IMLA, also provides a direct "causal link" between the breach of an enforceable trust duty under IMLA and the damages sustained by the Navajo. Judge Schall's reasoning conforms with all the authorities.[17] It is hornbook law that

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[17] *See, e.g., Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992) ("the Secretary's discretion to approve or disapprove leases . . . must be governed by fiduciary standards and limited by fiduciary duties"); *Cheyenne-Arapaho Tribes v. United States*, 33 Fed. Cl. 464, 468 (1995) ("when DOI leased mineral rights on plaintiffs' lands, it was obliged to use reasonable skill and care in an effort to maximize the benefits, financial and otherwise, that the Tribes would receive from those mineral leases"); *Youngbull*, 17 Indian L. Rptr. at 4005 ("In accord with trust responsibilities, the Secretary has a statutory and regulatory obligation to approve or reject leases according to the best interests of the Indians.").

the federal trust duty under IMLA requires the Department "to review all leases and amendments to leases to assure that the rent and royalty received by the Indian tribes or individual represents the best return that the market will bear." 3 *Am. L. of Mining* § 67.04 [4][d] (1999). The Government's notion that IMLA's approval requirement does not oblige the Secretary to reject improvident lease transactions, Pet. at 19, is pure fancy. The Secretary had done just that when the Navajo had negotiated another sub-12½% coal deal, albeit with a less well-connected coal company. C.A. App. A334; 3 *Am. L. of Mining* § 67.04 [4][d] at 67-17 (1999); *Felix S. Cohen's Handbook of Federal Indian Law* 537 & n.71 (1982). The duty to reject improvident transactions affecting Indian land is one of the cornerstones of federal Indian law, with a history going back to the earliest days of the Republic. *See* 25 U.S.C. § 177; *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960). Notably, Congress has allowed for the Navajo Nation to take steps to eliminate the requirement of federal approval for Navajo business site leases, but rejected any reduction of federal control over approval of Navajo mineral leases. *See* Navajo Nation Trust Land Leasing Act of 2000, Pub. L. No.

106-568, Tit. XII, 114 Stat. 2933 (*codified at* 25 U.S.C. § 415(e)(1)).

Similarly, the Department's acknowledged violation of 25 C.F.R. § 211.2 (1985) by forcing the Navajo into multi-year "negotiations," *see* C.A. App. A839, directly caused the damage to the Navajo, as the Department knew it would. *See, e.g.*, Pet. App. 51a-52a; C.A. App. A1263-64, A1667-71.

d. Application of Common Law Standards

The Court of Appeals did not "put[ ] the United States in the shoes of a private, common law trustee for determining *whether* the government has assumed money-mandating obligations to an Indian tribe," as argued by the Government. *See* Pet. at 26 (emphasis added). Rather, the court below first determined, consistent with *Mitchell II*, that the United States assumed money-mandating trust obligations to manage tribal minerals by taking on control of those resources through a comprehensive statutory and regulatory scheme. The Court of Appeals only then measured the Government's *conduct* as trustee with reference to common law trust standards.

The application of common law trust standards to judge the Government's *conduct* as trustee is consistent with both *Mitchell II* and other venerable authorities. This Court has ruled consistently that the Government's "conduct, as disclosed in the acts of those who represent it in its dealings with the Indians, should . . . be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.*, at 297 n.12. "There is no doubt that the United States serves in a fiduciary

capacity with respect to [the] Indians and that, as such, it is duty bound to exercise great care in administering its trust." *United States v. Mason*, 412 U.S. 391, 398 (1973). As the Chief Justice stated for a unanimous Court, "[i]t is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity. *See Seminole Nation v. United States*, 316 U.S. 296-97 . . . " *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). *Mitchell II* itself both relied on the common law of trusts, *see* 463 U.S. at 225-26, and also cited with approval numerous decisions expressly applying the *Seminole* standard in imposing monetary liability on the United States for breaches of trust.[18]

Application of the *Seminole* standard specifically in the Indian mineral leasing context is also well established. The Government's duties in this regard are certainly fiduciary in nature. *See Poafpybitty*, 390 U.S. at 373-74 (referring to the "trust obligations" of the Government under IMLA); *Supron*, 728 F.2d at 1563 (applying *Seminole* standard to IMLA decisions); *Assiniboine*, 792 F.2d at 794 (applying *Seminole* and *Mason* standards to IMLA decisions). The application of these standards, with their long established meanings, *see N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981), and a federal Indian law pedigree dating to the earliest years of the Republic, *see Seminole*, 316 U.S. at 296 (relying on, *e.g.*, *Cherokee Nation*

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[18] *See Mitchell II*, 463 U.S. at 226 n. 31, citing, *inter alia*, *Coast Indian Community v. United States*, 550 F.2d 639, 652-53 (Ct. Cl. 1977); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975); *Mason v. United States*, 461 F.2d 1364, 1373 n.10 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); *Smith v. United States*, 515 F. Supp. 56, 60 (N. D. Cal. 1978): *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1243 (N. D. Cal. 1973).

v. State of Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831)), is supported by the decisions of this Court and every other court that has addressed the issue.

e. Interplay with Tribal Self-Determination

The Government urges that respect for tribal self-determination dilutes trust duties under IMLA. Specifically, the Petition urges that the Indians' ability to enter into a mineral lease with Secretarial consent lessens the Government's management role. Pet. at 17-18. This is the same argument that the Government made, unsuccessfully, in *Mitchell II*. *See* Brief for the United States, No. 81-1748 (Sept. 3, 1982) at 35 ("the congressional objective [in the timber leasing statute, 25 U.S.C. § 406(a)] was to encourage Indian self-government and Indian control over exploitation of Indian natural resources"). This argument has no more validity in the mineral leasing context than it had in *Mitchell II*. The federal Government's commitment to tribal self-determination in no way compromises its fiduciary obligations under IMLA.

IMLA's only nod to tribal self-determination was to prevent the Secretary from leasing tribal minerals over the Indian's objections. Stated another way, IMLA allows the Indians to make the initial leasing decision if the Government agrees with it. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L. J. 541, 558-61 (1994). IMLA and its implementing regulations "leave no significant authority in the hand of the Indian tribes." Pet. App. 10a; Royster, at 565 (IMLA "kept tribes largely in the position of passive lessors"). But even if IMLA allowed tribes to exercise significant management authority, the Government presents a false dichotomy.

President Nixon, who forged the Indian self-determination policy, found vigorous enforcement of the trust duty and respect for tribal self-determination to be complementary. President Nixon sought to ensure Federal support for tribal self-determination by emphasizing, not limiting, the trust duty. Focusing on the Indians' "natural resource rights," President Nixon emphasized that "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 573.

President Reagan continued the policy of government-to-government respect. President's Statement on Indian Policy, 1983 Pub. Papers 96, 97. But that respect was not to come at the expense of the trust relationship:

> In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Id. at 96. President Bush continued this course. President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662. President Bush affirmed that the federal trust duty in the natural resources context was "an obligation of the highest responsibility and trust," to be judged "by the most exacting fiduciary standards." Statement on Signing the Department of the Interior and Related Appropriations Act, 1991, 26 Weekly Comp. Pres. Doc. 1768, 1769 (1990).

Nor does *Congress* view fulfillment of the trust duty as incompatible with respect for tribal governments. The Indian Self-Determination statute fulfilling President

Nixon's vision makes that clear. *See* 25 U.S.C. § 450n(2). Congress also emphasized this principle in the Indian-Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. §§ 2101-2108. IMDA was enacted "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources." S. Rep. No. 97-472, 97th Cong., 2d Sess. 2 (1982). The House report explained that 25 U.S.C. § 2103(e), which recognized "continuing" trust duties in the case of mineral leasing,

> simply restates the law as it exists today. If the Secretary, acting as trustee, approves a lease . . . or otherwise acts in relation to the trust resources of an Indian tribe and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability.

H.R. Rep. No. 97-746, 97th Cong., 2d Sess. 7-8 (1982); *accord* S. Rep. No. 97-472, 97th Cong., 2d Sess. 4-5 (1982).

The Department was not advancing the policy respecting tribal self-government when it secretly conspired with Peabody to cheat the Navajo Nation.[19] Honest consultation with, not deception of, Indian tribes is the cornerstone of the modern federal-tribal relationship. *See, e.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (2000). Indeed, as the Department recognizes, "maximiz[ing] the economic return on Indian mineral development [helps] to achieve

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[19] Had the Department truly respected tribal decision-making in this case, it would have decided the royalty appeal, not rewarded Peabody's *ex parte* strategy. *See, e.g.*, Pet. App. 40a; C.A. App. A468, A766-67, A2792-93.

greater Indian self-determination." 42 Fed. Reg. 18,083 (1977). Minimizing that return surely undermines tribal self-determination.

f. Inadequacy of Equitable Relief

The Petition urges that the Navajo Nation's sole recourse is an action for equitable relief under the Administrative Procedure Act. *See* Pet. at 24-25. *Mitchell II* rejected this argument, because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227. That is especially true here, where, unlike timber, the coal resource is non-renewable and the Government concealed its intentional mismanagement of that resource for a decade.

II. THIS CASE PRESENTS NO ISSUE OF GENERAL IMPORTANCE, AND REVIEW WOULD BE PREMATURE.

a. The Petition urges that this case be paired with *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3475 (U.S. April 22, 2002) (No. 01-1067). However, the procedural posture of *White Mountain* is quite different. The Court of Appeals noted there that the Apache had not proved a breach of any federal duty, 249 F.3d at 1381, and it "express[ed] no view as to the existence or nature" of any federal duty, *id.* at 1380. Some of the claims may be premature; others (or all) may be barred by limitations. *Id.* at 1383. Moreover, *White Mountain* involves a *sui generis* act of Congress, and the decision in that case turned on arcane property law concepts unrelated to the body of federal/Indian trust law. *See id.* at 1381-82, and *compare id.* at 1384-85 (Mayer, C.J., dissenting).

By contrast, the Court of Appeals' decision below in *Navajo Nation* is a straightforward application of *Mitchell II*. Therefore, pairing the two cases might have some academic appeal, *see* Pet. at 27, but would add little, if anything, to the comprehensive framework established by the two *Mitchell* decisions.

b. As the Government stresses, the Navajo Nation alleges that the Department's violations of its trust duties resulted in significant damages. If the Court of Federal Claims awards damages on remand and the Government disagrees, this Court will have the opportunity to review the final judgment upon a complete record, and address jurisdiction, liability, and damages. *See Missouri v. Jenkins*, 515 U.S. 70, 83-84 (1995). At this stage, however, review is unnecessary and premature. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (per Scalia, J., on denial of certiorari).

CONCLUSION

The court of appeals' interlocutory decision faithfully applies the *Mitchell* framework. The lower courts are in harmony on all the legal issues. The Petition should therefore be denied, or the judgment below summarily affirmed under Rule 16.1.

Respectfully submitted,

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No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

The Federal Circuit held that the United States may be liable to the Navajo Nation (Tribe) for up to $600 million in damages for breach of trust in connection with a mineral lease agreed to by the Tribe and a private company, without finding that the government violated any specific statutory or regulatory duty. The Tribe defends that result largely by seeking to recast this Court's *Mitchell* decisions,[1] and to equate the potential liability of the United States for breach of trust with that of a common law trustee. The Court should grant certiorari and, together with *United States* v. *White Mountain Apache Tribe*, cert. granted, No. 01-1067 (Apr. 22, 2002), clarify when the United States may be subject to money damages for breach of an alleged fiduciary obligation owed to an Indian Tribe.[2]

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[1] *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

[2] In its statement of the case (Br. in Opp. 2-8), the Tribe seeks to describe various disputed events in the light most favorable to it. But for purposes of determining whether the court of appeals properly concluded that the United States breached a fiduciary duty to the Tribe, Pet. App. 13a, the record at this summary judgment stage must be viewed in the light most favorable to the government. See *Howlett* v. *Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994). Moreover, many of the events discussed by the Tribe have no relation to the basis on which the court of appeals found a

1. Because the Tribe seeks to recharacterize the case before this Court, we begin by restating what the court of appeals held. After concluding that the Indian Mineral Leasing Act (IMLA) and its implementing regulations give the Secretary "control of Indian mineral leasing activities," Pet. App. 10a, the court of appeals found that the Secretary violated a fiduciary duty by "suppressing and concealing" a draft decision by the Deputy Assistant Secretary for Indian Affairs in connection with Peabody's administrative appeal of the BIA Area Director's unilateral setting of a 20% royalty rate under the lease. *Id.* at 11a-12a. The court further held that the government is subject to money damages for that breach. *Id.* at 13a. As Judge Schall emphasized in his separate opinion, however, the court "fail[ed] to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship" under the IMLA. *Id.* at 26a; see *id.* at 28a.[3]

2. The Tribe contends that the court of appeals' decision in this case "faithfully applies" the *Mitchell* decisions. Br. in Opp. 30; see *id.* at 9. As explained in the petition (at 20-25), however, the court of appeals' reasoning is fundamentally incompatible with both *Mitchell I* and *Mitchell II*.

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fiduciary breach. In any event, the question presented does not require the Court to resolve any disputed facts concerning an alleged breach of trust on the part of the government. It instead calls for the Court to decide only whether the court of appeals properly held that the United States may be liable in damages for the alleged breach, even though the court did not identify the violation of any specific statutory or regulatory duty on the government's part.

[3] The Court of Federal Claims reached the opposite conclusion. See Pet. 9-11. That court reasoned that, even though the Tribe had shown "that the Secretary did not act as a proper trustee" under the common law, the Tribe's claim for damages failed because "the [Tribe] fail[ed] to demonstrate a 'breach of a *specific* duty that the [statute or] regulations squarely place on the Secretary." Pet. App. 66a; see *id.* at 75a.

a. The Tribe argues (Br. in Opp. 10-12) that the existence of federal control over an Indian resource is itself sufficient under *Mitchell II* to support a damages claim against the United States for mismanagement of that resource. See Pet. App. 5a. In *Mitchell II*, however, the Court did not look to the existence of federal control in the abstract. Instead, the Court looked to whether the particular statutes and regulations on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose." 463 U.S. at 219. In other words, even though the Court found the existence of extensive federal control with respect to the management of the Indian resources at issue, it still required the Indian plaintiffs to show the violation of a *specific* statutory or regulatory duty in exercising such control. That requirement follows directly from the text of the Tucker Act itself, which, as relevant here, provides that a claim for money damages against the United States must be founded upon an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491.

b. The Tribe argues (at 12-20) that the federal government has assumed just as much control over Indian mineral leasing as it has over Indian timber management. See Br. in Opp. 13-16. But as explained in the petition (at 20), and as the Court of Federal Claims specifically found, the regulatory scheme at issue in this case "falls far short of [creating] the detailed fiduciary responsibilities of *Mitchell II*." Pet. App. 68a. That is particularly true when it comes to management by the Secretary. Whereas the statutes and regulations at issue in *Mitchell II* gave the federal government "*full* responsibility to manage Indian resources and land for the benefit of the Indians," 463 U.S. at 224 (emphasis added), the IMLA and its implementing regulations give *to the Tribes* the authority to lease mineral resources as they see fit, and assign to the Secretary only a general oversight role in approving such leases. See 25 U.S.C. 396a; Pet. App. 67a

("The Navajo Nation cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process."). Indeed, as explained in the petition (at 17-18), one of the primary purposes of the IMLA was to transfer control over Indian mineral leasing decisions *from* the federal government *to* Indian mineral owners.[4]

In any event, regardless of the difference between the degree of federal control in this case and in *Mitchell II*, this case fundamentally differs from *Mitchell II* in that the court of appeals failed to link the Tribe's damages claims to the violation of any specific duty established by the regulatory scheme. The damages claims in *Mitchell II* were carefully predicated on the violation of specific statutory and regulatory duties. The Indian plaintiffs in *Mitchell II* alleged, *inter alia*, that the Secretary "failed to obtain a fair market value for timber sold"; "failed to manage timber on a sustained-yield basis"; "failed to obtain any payment at all for some merchantable timber"; and "exacted excessive administrative fees from allottees." 463 U.S. at 210. Each of those claims tracked specific statutory and regulatory duties.[5] By contrast, as Judge Schall explained below, the court of

[4] The government did not, as the Tribe contends (Br. in Opp. 12), "concede[]" that it exercises the type of control with respect to Indian minerals that it does with respect to Indian timber. Rather, the government noted below that to the extent that the IMLA regulations may be extensive in specific aspects (such as rights-of-way and surface exploration), they are *not* with respect to others, in order to underscore the dearth of requirements governing the specific aspect of Indian mineral leasing at issue in this case—*i.e.*, the approval of leases and lease amendments. C.A. App. 2108, 2986.

[5] See, *e.g.*, 25 U.S.C. 406 (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

appeals in this case "fail[ed] to find a breach of a specific fiduciary responsibility" assumed by the government in a statute or regulation, much less one that mandates the payment of damages for a violation. Pet. App. 26a. That clear departure from the analytical framework of *Mitchell II* warrants this Court's review.

Furthermore, the court of appeals made no effort to tie the alleged breaches of trust even to *general* duties imposed by the IMLA and its implementing regulations. In finding the breach of a fiduciary duty that would support a claim for damages, the court of appeals focused on the Secretary's actions in connection with Peabody's administrative appeal in 1984 of a decision the parties later agreed to vacate (see Pet. 7-8), rather than the reasonableness of the royalty rate and the full package of lease amendments that were actually agreed to by the parties and approved by the Secretary in 1987. The Secretary's actions with respect to the pending administrative appeal were governed by the Department's general procedural rules and the Administrative Procedure Act, which plainly do not authorize the payment of damages for a violation (if indeed there were any violation in this case), and not by the IMLA provision (25 U.S.C. 396a) governing approval of Indian mineral leases or amendments. See Pet. 23-24. Moreover, the Tribe itself does not seek to set aside the lease amendments to which they agreed in 1987 because, as the Tribe recognized below, "there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation." Pet. App. 50a.

c. Although the court of appeals did not believe that it was necessary to tie the Tribe's damages claims to a violation of a specific statutory or regulatory duty, the Tribe attempts to do so, but fails. The Tribe asserts (Br. in Opp. 17) that "both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians." The statutory language in 25 U.S.C. 396b on which the Tribe relies, however, governs the circumstances

in which the Secretary may *reject* the highest bid for *oil and gas* leases; the statute governing the *approval* of *coal* leases (25 U.S.C. 396a) does not contain any comparable language. And the version of the regulation cited by the Tribe (25 C.F.R. 211 (2001)) was not promulgated until 1996, more than a decade *after* the events at issue in this case. See Pet. 22. Moreover, whereas that regulation now obligates the Secretary to find that a lease is "in the best interest of the Indian mineral owner" when it has a royalty rate *less* than the minimum rate for leases of federal coal, the regulation notably does not require the Secretary to make such a finding before approving a lease—like the one at issue here—with a rate equal to or more than the minimum federal rate. 25 C.F.R. 211.43(b) (2001). The governing regulations thus refute the notion that the Secretary is obligated by the IMLA to ensure that every proposed lease agreed to by a Tribe will maximize the return to the Tribe. See *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989); Pet. 16-19.[6]

Indeed, in stark contrast to the particular statutory and regulatory provisions at issue in *Mitchell II*, see 463 U.S. at 222, neither the IMLA nor its implementing regulations establish any specific duties governing the Secretary's approval of a lease or lease amendment, except to the extent that they establish a minimum royalty rate for coal leases (now set at the minimum rate for federal coal leases). 25

[6] Even if the IMLA did impose a duty on the part of the Secretary to act in the best interests of Indian mineral lease owners, that would not automatically lead to the conclusion that a breach of such a vague and generalized duty would give rise to a claim for money damages. As discussed in the petition (at 17, 19), in *Mitchell I* this Court held that the Indian plaintiffs failed to state a claim for money damages even though the statute in that case expressly obligated the United States to hold allotments "in trust for the sole use and benefit of [Indian allotees]." 445 U.S. at 541. The Tribe's brief in opposition all but ignores *Mitchell I*. Although *Mitchell II* added to the foundation laid by *Mitchell I*, it in no way overrides *Mitchell I*.

C.F.R. 211.15(c) (1985 & 1987); 25 C.F.R. 211.43(b) (2001); see Pet. 3 & n.1. The lease amendment at issue in this case met the minimum rate. See Pet. 22 n.10. There is no requirement that the Secretary insist that parties to a proposed Indian mineral lease agree to a higher rate under particular circumstances, and such a requirement would be inconsistent with the central aim of the IMLA—to allow *Indian mineral owners* to negotiate their *own* lease terms, subject only to a backstop protection of approval by the Secretary. See Pet. App. 68a.[7]

The Tribe asserts (Br. in Opp. 6) that "[t]he process required by IMLA for Secretarial approval * * * requires an economic analysis [of a mineral lease] to determine if it were in the Tribe's best interest." But the Tribe does not cite any statute or regulation requiring such an analysis. Moreover, while the Secretary may choose to conduct her own economic analysis in deciding whether to approve a lease, judicial imposition of an economic-analysis requirement would be inconsistent with the statute's focus on permitting Indian mineral owners to negotiate their own rates, subject to the minimum federal rate. Requiring the Secretary to conduct her own economic analysis of every Indian mineral lease submitted for her approval would always require the Secretary to substitute her own judgment for that of the Indian mineral owner, and all but render the lease negotiations

[7] The Tribe asserts (Br. in Opp. 20) that the Secretary also violated 25 C.F.R. 211.2 (1985). In pertinent part, that provision authorizes the negotiation of Indian mineral leases, and reserves to the Secretary the right "to direct that negotiated leases be rejected." *Ibid.* It also provides that negotiated leases shall be filed with the Indian agency after 30 days, unless that time is extended by the Area Director. The court of appeals did not rely on, much less find a violation of, Section 211.2. Moreover, as *Mitchell II* makes clear, in order to support a claim for money damages, a statute or regulation must "fairly be interpreted as mandating compensation for damages sustained." 463 U.S. at 219. Nothing about Section 211.2 lends itself to such an interpretation.

between the Indian mineral owner and private parties a technical formality.

d. The Tribe argues that it need not identify any violations of particular statutory or regulatory duties because, "[w]hile the general contours of the government's obligations may be defined by statute, the interstices are filled in through general trust law." Br. in Opp. 12. That argument is directly contradicted by the text of the Tucker Act and by *Mitchell II*, which focus on whether the statutes or regulations at issue "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added). Holding that the United States may be liable in damages for the violation of any duty discoverable in the "interstices" of the law of trusts would vastly expand the potential liability of the United States for breach of trust, not to mention conflict with bedrock principles of sovereign immunity. See Pet. 14-15. And it would leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid the imposition of damages claims.

3. The Tribe suggests that review at this stage of the case is "unnecessary and premature." Br. in Opp. 30. But the fact that the *amount* of damages has yet to be determined in no way alleviates the need for review, just as it did not in *Mitchell I* or *Mitchell II* or, more recently, in *White Mountain Apache Tribe*, No. 01-1067. Under the court of appeals' decision, the United States may be liable for up to $600 million in damages, nearly six times the amount of damages at issue in *Mitchell II*. See 463 U.S. at 211 n.7. There is no reason for the Court to require lengthy proceedings on damages, including on the historical or present value of the comprehensive package of lease amendments negotiated more than 15 years ago, when a serious question exists as to the court of appeals' threshold liability ruling. And there is no merit to the Tribe's suggestion (Br. in Opp. 30) that the

Court wait to see if the United States "disagrees" with the actual damages award that would be entered, when the United States' position is that the Tribe has not stated a claim for *any* money damages in the first place.

4. Finally, although the Tribe defends the court of appeals' decision, it does not seriously dispute the importance of this case or the basic issues addressed in the *Mitchell* decisions. Whether statutes or regulations governing Indian resources may subject the United States to suits for money damages is a question of recurring and fundamental importance. Indeed, the Hopi Tribe has filed a suit virtually identical to that filed by the Navajo Nation in this case. See *Hopi Tribe* v. *United States*, No. 00-CV-217 (Ct. Fed. Cl. filed Apr. 18, 2000); Pet. 27-28. The Federal Circuit's decision in this case, like its recent decision in *White Mountain Apache Tribe*, fundamentally misconstrues the basic principles established by this Court for determining when the United States may be liable in damages for breach of trust.

The recent grant of certiorari in *White Mountain Apache Tribe*, No. 01-1067, does not alleviate the need for review in this case. Although both cases generally concern the necessary predicate that an Indian Tribe must establish to bring a claim for damages against the United States for breach of fiduciary duty, they present that issue in quite different contexts. In *White Mountain Apache Tribe*, the court of appeals found that the United States may be liable for money damages under a statute that places property into trust for an Indian Tribe, even though the statute reserves *to the government* the right to use the property for government purposes "for as long as" it deems necessary. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. See No. 01-0167 Pet. at 14-16. The instant case, by contrast, involves a statute providing for the Secretary to approve actions taken *by the Tribe*, and presents an opportunity to decide whether the Tribe in such a case is excused from the need to show the

violation of a specific statutory or regulatory duty that can be fairly interpreted as mandating compensation.

The Federal Circuit's recent decisions in *White Mountain Apache Tribe* and in this case demonstrate that this Court's guidance is needed on the proper application of the *Mitchell* principles. Granting certiorari in both *White Mountain Apache Tribe* and this case would provide the Court with an opportunity to address those principles in a comprehensive manner. In any event, the recent grant of certiorari in *White Mountain Apache Tribe* does not detract from the importance of, or need for review in, this case, in which the judgment below subjects the United States to a potential liability of up to $600 million.[8]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MAY 2002

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[8] Contrary to the Tribe's suggestion (Br. in Opp. 12-13), the government did not concede that it has waived its sovereign immunity from suit with respect to the damages claims in this case. In the court of appeals, the government stated that the Court of Federal Claims had jurisdiction to determine whether the Tribe stated a claim for relief under the Tucker Acts, but argued that the Tribe "failed to state a claim that would entitle [it] to relief." Gov't C.A. Br. 1-2. That position was consistent with circuit precedent differentiating between a dismissal for lack of jurisdiction and for failure to state a claim under the Tucker Acts. See *Pawnee* v. *United States*, 830 F.2d 187, 192 n.7 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). In *Mitchell II*, this Court held that when a court concludes that a claim does not fall within the scope of the Tucker Acts, the Tucker Acts' waiver of sovereign immunity does not apply, and the claim is barred. 463 U.S. at 218. The United States has consistently maintained in this case that the Tribe has failed to state a claim under the Tucker Acts and, therefore, that the United States is immune from the Tribe's damages claims.

(10)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
(VOLUME I)

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PETITION FOR WRIT OF CERTIORARI FILED: MAR. 15, 2002
CERTIORARI GRANTED: JUNE 3, 2002

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UNITED STATES COURT
OF THE FEDERAL CLAIMS

No. 93-763

NAVAJO NATION

v.

UNITED STATES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/14/93	1	COMPLAINT. FILING FEE OF $120 PAID. RECEIPT #35665. due on 2/14/94. (ab)
		* * * * *
3/16/94	6	ANSWER to Complaint by USA Service: 3/16/94 (JPSR due 5/3/94). (mm) [Entry date 03/22/94]
		* * * * *
3/30/95	29	FIRST AMENDED COMPLAINT by THE NAVAJO NATION (Answer due 4/12/95 amending [1-1] complaint Service: 3/29/95 (mp)

DATE	DOCKET NUMBER	PROCEEDINGS
4/5/95	30	ANSWER TO AMENDED Complaint by USA. Service: 4/4/95 (as) [Entry date 04/07/95]
		* * * * *
12/15/97	168	MOTION by THE NAVAJO NATION (Service: 12/15/97) for Summary Judgment on the issue of liability on its first claim for relief, together with three separate volumes of appendix (Sealed portion of appendix UNSEALED pursuant to 7/7/00 order). Response due: 1/15/98 (cdc) [Entry date 12/23/97] [Edit date 09/14/00]
12/15/97	169	PROPOSED FINDINGS of Uncontroverted Fact by THE NAVAJO NATION Service: 12/15/97 (cdc) [Entry date 2/23/97]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/24/98	180	CROSS MOTION by USA (Service: 3/17/98) and RESPONSE to [168-1] motion for Summary Judgment by THE NAVAJO NATION. Separate Volume of Appendix and Confidential excerpts from the deposition of Gregory J. Leisse (Exhibit 55)-UNSEALED pursuant to 7/7/00 order. Filed by leave of the Judge. Response due: 4/17/98 9 (jt) [Entry date 03/25/98] [Edit date 09/14/00]
3/24/98	181	PROPOSED FINDINGS of Uncontroverted Fact by USA. Filed by leave of the Judge. Service: 3/17/98 (jt) [Entry date 03/25/98]
3/24/98	182	STATEMENT OF GENUINE ISSUES by USA. Filed by leave of the Judge. Service: 3/17/98 (jt) [Entry date 3/25/98]
		* * * * *
6/1/98	187	RESPONSE by THE NAVAJO NATION (Service: 5/29/98) To [180-1] cross motion. 1 Separate Volume of Appendix (Volume IV). Reply due: 7/17/98 2 DEPOSITION TRANSCRIPT EXCERPTS UNSEALED pursuant to 7/7/00 order. (jt) [Entry date 06/02/98] [Edit date 09/14/00]

DATE	DOCKET NUMBER	PROCEEDINGS
6/1/98	188	STATEMENT OF GENUINE ISSUES by THE NAVAJO NATION. Service: 5/28/98 (jt) [Entry date 06/02/98]
6/1/98	189	PROPOSED FINDINGS of Uncontroverted Fact by THE NAVAJO NATION. Service: 5/28/98 (jt) [Entry date 06/02/98]
		* * * * *
6/17/98	192	CORRECTED RESPONSE by THE NAVAJO NATION (Service: 6/16/98) to [180-1] cross motion. (ab) [Entry date 06/18/98]
		* * * * *
8/3/98	199	REPLY by USA to response to [180-1] cross motion. Service: 8/3/98 (jt) [Entry date 08/05/98]
		* * * * *
8/4/98	200	STATEMENT OF GENUINE ISSUES in response to Plaintiff's additional proposed findings of uncontroverted fact by USA. Filed by leave of the Judge. Service: 8/3/98 (jt) [Entry date 08/07/98] [Edit date 08/07/98]

DATE	DOCKET NUMBER	PROCEEDINGS
8/4/98	201	CLARIFICATION of Certain Proposed Findings of Fact in Response to Plaintiff's Statement of Genuine Issues by USA. Filed by leave of the Judge. Service: 8/3/98 (jt) [Entry date 08/07/98] [Edit date 08/07/98]
9/17/98	202	Supplemental Authorities by THE NAVAJO NATION. Filed by leave of the Judge. Service: 9/14/98 (jt) [Entry date 09/21/98]
		* * * * *
4/30/99	210	Supplemental authorities by THE NAVAJO NATION re: cross-motions for summary judgment filed [by leave of the judge]. Service: 4/27/99 (ds) [Entry date 05/04/99]
		* * * * *
5/4/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION (Transcript due 6/3/99), [180-1] cross motion by USA (Transcript due 6/3/99) (ds) [Entry date 05/05/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/23/99	218	MEMORANDUM by THE NAVAJO NATION re: the Court's inquiry regarding origin of provision in lease amendments calling for vacation of area director's decision. Filed by leave of the Judge. Service: 6/18/99 (jt) [Entry date 06/25/99]
		* * * * *
9/22/99	241	NOTICE of Supplemental Authority by THE NAVAJO NATION. Filed by leave of the Judge. Service: 9/16/99 (jt) [Entry date 09/28/99]
		* * * * *
11/18/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION [180-1] cross motion by USA set at 10:00 a.m. on 12/1/99 (ds) [Entry date 11/19/99]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/1/99	—	Oral Argument re: [168-1] motion for Summary Judgment by THE NAVAJO NATION (Transcript due 1/3/00), [180-1] cross motion by USA (Transcript due 1/3/00) (ds) [Entry date 12/02/99]
		* * * * *
2/4/00	295	PUBLISHED DECISION concluding the facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owned a fiduciary duty—a classic violation of common law fiduciary obligations. Nonetheless, the Navajo Nation has failed to present statutory authority which can be fairly interpreted as mandating compensation for the government's fiduciary wrongs. Defendant has thus established its right to

DATE	DOCKET NUMBER	PROCEEDINGS
		judgment as a matter of law. Further, the Court finds that the government did not enter into a contract with Navajo Nation either by the express terms of Lease 8580 or by implication. Accordingly, defendant's motions for summary judgment with respect to plaintiff's breach of trust claim and its breach of contract claim are granted [180-1]. The Clerk of Court is directed to enter judgment for defendant and dismiss plaintiff's First Amended Complaint. (signed by Judge Lawrence M. Baskir). Copy to parties. (ld)
2/4/00	296	JUDGMENT entered, pursuant to Rule 58, that judgment is entered in favor of the defendant and the First Amended Complaint is dismissed. (signed by Clerk). Copy to parties. (ld)
2/4/00	—	Case closed (ld)

DATE	DOCKET NUMBER	PROCEEDINGS
2/18/00	297	MOTION by THE NAVAJO NATION (Service: 2/18/00) for Reconsideration/Rehearing Pursuant to Rule 59 re: [296-1] judgment order. (jt) [Entry date 04/11/00]
		* * * * *
3/29/00	303	RESPONSE by USA (Service: 3/29/00) to [297-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [296-1] judgement order. Reply due: 4/18/00. (dw) [Entry date 03/30/00]
		* * * * *
4/10/00	306	UNPUBLISHED DECISION denying [291-1] motion for Reconsideration/Rehearing Pursuant to Rule 59 re: [296-1] judgment order. (signed by Judge Lawrence M. Baskir). Copy to parties. (jt) [Entry date 04/11/00]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/1/00	311	NOTICE OF CROSS-APPEAL by THE NAVAJO NATION. Copy to Judge Lawrence Baskir, Defendant, and to CAFC. FILING FEE $ 105.00; RECEIPT #-049744. (hw)
		* * * * *
6/9/00	—	CAFC Case Number Re: [311-1] appeal by THE NAVAJO NATION. CAFC Number: 00-5086. (hw) [Entry date 06/19/00]
		* * * * *
11/26/01	325	MANDATE (certified copy) from CAFC dated November 23, 2001 reversing the [296-1] judgment order (hw)
		* * * * *
6/3/02	329	NOTICE of Granting Certiorari by USA. Service: 6/3/02. (dw) [Entry date 06/04/02]

UNITED STATES COURT
OF THE FEDERAL CLAIMS

No. 00-5085

NAVAJO NATION

v.

UNITED STATES

Chief Judge Lawrence M. Baskir
Lower Court/Agency
#: 93-CV-763

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
8/25/00	NAVAJO NATION – BRIEF FOR APPELLANT AND SEPARATE APPELLANT'S ADDENDUM (MS-08/25/00). [001404] (EOD 8/29/00 by JAB) 00-5086
9/14/00	PEABODY HOLDING COMPANY, INC., ET AL. [AMICI] – BRIEF FOR AMICUS CURIAE, PEABODY HOLDING COMPANY, INC., PEABODY COAL COMPANY, AND PEABODY WESTERN COAL COMPANY (MS-08/31/00). [001418] (EOD 9/19/00 by JAB) 00-5086
11/02/00	UNITED STATES [APPELLEE] – BRIEF OF THE UNITED STATES (MS-11/02/00) [01149] (EOD 11/15/00 BY JAB) 08-5086

DATE	PROCEEDINGS
	* * * * *
12/01/00	NAVAJO NATION [APPELLANT] - REPLY BRIEF FOR APPELLANT. THE NAVAJO NATION (MS-12/01/00). [011487] (EOD 12/07/00 BY KP) 08-5086
12/06/00	NAVAJO NATION [APPELLANT] - JOINT APPENDIX (VOL. I, II, III) (MS-12/06/00). [011487] (EOD 12/08/00 BY SPP) 00-5086
	* * * * *
3/5/01	Submitted after ORAL ARGUMENT by Paul E. Frye and Todd S. Aagaard. 00-5086 (NEWMAN, SCHALL and LINN)
	* * * * *
8/10/01	REVERSED AND REMANDED. PRECEDENTIAL OPINION BY: J. NEWMAN. OPINION CONCURRING-IN-PART, AND DISSENTING-IN-PART BY: J. SCHALL. JUDGMENT ENTERED: 8/10/01. COSTS AGAINST APPELLEE. (EOD 8/10/01 BY EBG) 00-5086
	* * * * *
10/09/01	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (MS-10/09/01) PETITION CIRCULATED: 10/10/01. SUGGESTION CIRCULATED: 10/22/01. RESPONSE REQUESTED FROM: APPELLANT (NAVAJO NATION) RESPONSE DUE: 11/06/01 RESPONSE FILED: 11/02/01 RESPONSE CIRCULATED: 11/05/01 PETITION/SUGGESTION: DENIED ON 11/16/01. (EOD 11/16/01 BY AV) 00-5086

DATE	PROCEEDINGS
11/23/01	MANDATE ISSUED TO THE CFC. (EOD 11/23/01 BY AMT) 00-5086
	* * * * *
3/15/02	PETITION FOR WRIT OF CERTIORARI FILED. SUPREME COURT # 01-1375. (EOD 4/01/02 BY JNC) 00-5086

[SEAL OMITTED]

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20245

In Reply Refer To: Trust Services Minerals

[Nov. 26, 1975]

Memorandum

To: Deputy Under Secretary

From: Acting Director, Office of Trust Responsibilities, BIA

Subject: Coal Leasing Policy on Indian Lands

This is in response to your memorandum of November 25, concerning the subject.

In recent years there has been much discussion about the development of coal resources owned by Indian tribes. With the Nation facing a shortage in energy production, some have feared that efforts would be made by the Federal government to develop Indian coal against the wishes of the Indian owners, and without regard to the environmental impacts on the reservations. Therefore, we feel it prudent to set forth the following as the Coal Leasing Policy on Indian Trust Lands.

This Department is deeply committed to the principle of Indian self-determination, and this principle is especially valid with regard to the development of Indian-owned resources. Indian communities should be assured that any development can and will only take place

upon their request and in accordance with conditions established in that request.

Indian coal resources represent a significant part of the Western coal reserves. However, our estimates clearly indicate that the public lands contain adequate reserves to meet national needs. There is absolutely no reason for the tribes to fear that efforts will be made to exploit their resources without their full concurrence.

If the Indian tribes determine that they do not wish to develop coal resources they may have, it is their decision to make, and this decision will have the full support of the Department.

If, on the other hand, the tribes do want to proceed with some form of coal development, this too will have the full support of the Department. Such support will include detailed studies in order to prevent or minimize adverse social, cultural or other environmental impacts. It will also include technical advice and assistance to assure that such development will provide maximum long term economic benefits in terms of job opportunities and a fair monetary return reflecting the true value of their developed coal resources.

It is, therefore, the policy of this Department to approve coal leasing on Indian lands where:

(a) the tribal or individual Indian landowner desires to dispose of the coal;

(b) the terms and conditions of the lease are in the best interest of the Indian landowner; and

(c) appropriate environmental protection and reclamation safeguards are imposed on the lessee.

/s/ KENNETH J. FREDERICKS

F.R. Schwab & Associates, Inc.
management consultants
NEW YORK • DENVER • HOUSTON
645 Madison Avenue
New York, N.Y. 10022
(212) 758-6800

February 24, 1983
[Received Mar. 1, 1983]

Chairman Peterson Zah
The Navajo Nation
Window Rock, Arizona 86515

Dear Chairman Zah:

As you may know, the Navajo Nation asked our firm to examine the coal lease royalty arrangements (both the present ones and offers of a 12 1/2 percent royalty) between the Nation and Peabody and Utah International, and to make recommendations as to appropriate royalty levels on these coal leases.

Our study concluded (in our April 12, 1982 report) that both the existing leases and the proposed offers from Peabody and Utah International were inadequate and that the Nation should be receiving higher royalties from both Peabody and Utah. Our purpose in writing this letter to you is to bring these issues directly to your attention as there are undoubtedly substantial amounts of transitioning to be done between the administration of Chairman MacDonald and yourself. Since we regard the issue of coal lease royalty arrangements as a major one, and since so much substantive work has already been done in it we wanted to assure ourselves that the essence of it reached your attention

and those of your principal advisors, hence this letter. In this regard, our view is that:

- Peabody should pay the Nation $8 to $18 million per [*sic*] year above its proposed 12 1/2 percent offer.
- Utah should pay the Nation for its leases $4 to $9 million per year above the current offer.

(These amounts are substantially in excess of the amount actually being received by the Navajos.) These conclusions have been presented to both the utility and coal companies involved. (A brief summary of our conclusions is attached to this letter for your convenience).

We believe at that time we did this report (April, 1982) and we continue to believe that the Nation should seek to demonstrate that the offers of a 12 1/2 percent royalty are not nearly so reasonable or fair as the companies would have one believe. We suspect that this can be done by demonstrating that:

- The consumer of electricity generated with Navajo coal is paying less royalty to the landowner than is the consumer of electricity generated in the Southwest with coal from other sources (based on 12 1/2 percent royalty).
- Other western landowners which have coal similar in quality to the Navajo coal mined by Peabody are receiving higher royalty payments [*sic*] (based on a 12 1/2 percent royalty) than the Navajos would receive under the offer.

If the above two situations can be verified with hard factual data, then the Navajos would be in an excellent

position to conclusively demonstrate to the coal operators, the utility companies, the Department of Interior, and others that the proposed offers are both inappropriate and would inadequately compensate the Nation for the coal reserves which they are providing.

Thus, the current situation is that (1) a sound and logical case has been presented that the Nation should be receiving substantially higher royalty payments than that currently being paid or being offered by Utah International and Peabody, and (2) the Nation needs to factually and conclusively demonstrate that the current offers from Utah International and Peabody are unfair and inconsistent with the royalty payments for other coals mined and burned in the region.

We believe that the Nation's case is a strong one. We would be happy to discuss both our past work and our ideas as to how the Nation might further strengthen its case as outlined above. We also have other ideas which we would like to share with you.

If you wish to discuss these or other matters, please contact Earle Johnson (our Principal in charge of the work) or myself at the above address or telephone number.

Cordinally,

/s/ FRANK SCHWAB JR.
F.R. SCHWAB & ASSOCIATES, INC.

Frank Schwab, Jr.
President

FS:SVR

Attachment

June 15, 1984

Area Real Property Management Officer
Proposed Royalty Adjustment of Navajo Coal Lease No. 14-20-0603-8580 (Kayenta Coal Mining Lease by Peabody Coal Company)

Through: Area Director
Assistant Area Director (Resources)

I have reviewed the economic evaluation reports submitted by our Denver Office and the Bureau of Mines regarding the royalty adjustment that is appropriate in August pursuant to Article VI of the above-referenced lease. The reports are based upon some assumed data, particularly capital and operating costs, incorporated with data provided by our office and from the Navajo Tribe.

I also have reviewed the F.R. Schwab & Associates, Inc., report dated April 12, 1982, to the Navajo Nation and the report of Ahmed Kooros, of the Council of Energy Resource Tribes.

The Bureau of Mines has determined that Peabody could afford to pay a royalty of 20.0 percent to the Navajo Tribe and still realize a 20.85 percent rate of return.

Our Denver Office has prepared an independent financial analysis of Peabody's Coal Project and have submitted a summary of the analysis of four (4) different cases, ranging from 12.5 percent to 30 percent and have recommended the "Kayenta" base royalty be adjusted and raised to 24.44 percent.

The Schwab report does not clearly recommend a specific royalty that would be appropriate. It states that a rate of 12.5 percent would be "inadequate."

The CERT report recommends a royalty rate of between 15 and 20 percent.

There is a federal statute that sets 12.5 percent as the minimum coal royalty, but technically it may not apply to Indian lands.

Based on the analysis by our Denver Office, I believe that the royalty adjustment to 24.44 percent, suggested by our Denver Office, is unreasonably high. That recommendation seems intended primarily to establish a bargaining position for a general renegotiation of the Peabody lease rather than a final, fair, supportable readjustment of royalty as permitted by the more limited authority of Article VI of the lease. However, the report clearly supports a royalty adjustment to well in excess of 12.5 percent.

The Bureau of Mines report is more reasonable and justifiable. I support their recommendation.

Therefore, I recommend to you a royalty adjustment of 20.0 percent as a final adjustment decision by your office.

The company should be notified that it must begin paying 20.0 percent royalty on August 28, 1984.

[Seal Omitted]

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
P.O. Box M
Window Rock, Arizona 86515-0714

In Reply Refer To:
ARPM/Minerals

[June 18, 1984]

CERTIFIED MAIL–RETURN RECEIPT REQUESTED

Mr. Kenneth R. Moore
Peabody Coal Company
Arizona Division
1300 South Yale Street
Flagstaff, Arizona 86001

Re: Lease No. 14-20-0603-8580 (assigned to Peabody Coal Company) Readjustment of Royalty

Dear Mr. Moore:

This letter will notify you of my decision to adjust the royalty rate on coal mined under the above-referenced lease to 20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f.

In reaching this decision I have considered reports and recommendations from the Bureau's Navajo Area and Energy and Mineral Resources Offices, the Bureau of Mines and others. Those reports are on file in the Navajo Area, Branch of Real Property Management Office.

The basis for this adjustment is the first sentence of Article VI of the lease, originally entered between The Navajo Tribe and Sentry Royalty Company. I am the representative of the Secretary of the Interior authorized to make this adjustment, as evidenced by 10 BIAM 3.0 (copy enclosed).

This is the final decision by my office on this matter. If you wish to appeal this decision pursuant to the provisions of 25 CFR Part 2, you must file a notice of appeal with my office within 30 days of the date you receive this notification.

Sincerely,

/s/ DONALD DODGE
Area Director

Enclosure

TABLE 11. CONSEQUENCES OF 20% ADJUSTMENT ON MINE PRICE LEASE 14-20-0603-8580

Item	Royalty $/Ton	Mine Price $/Ton	Mine Price[3] $ Cost/Million BTU
1964 Lease	0.33	17.35[1]	0.79
20% Royalty Adjustment	3.47	20.82[2]	0.95

Source: Table 6.

[1] Mine Price, 1983.
[2] Mine Price of 1983 with the 20% adjustment for 1984.
[3] 11,000 BTUs/pound. For a larger portion of electricity needs of the members of consortia, which rely greatly on the Navajo plant, the average cost is less than 0.95/million BTU.

If the royalty rate of Navajo coal were increased to 20% of the mine price (16 cents/million BTU is 1984 prices as against the percent 1.5 cents/million BTU) and the higher royalty costs were totally passed on to the power plants and the utilities' customers, then:

1. The two power plants still would have fuel costs among the cheapest in the Southwest.

2. This would have less than one percent (for Nevada Power, it would be 1.5%) impact on the monthly electricity bill of the customers of the five consortia members and would not change their ranking in monthly costs among southwestern utilities.

According to the available standards, this is not only a reasonable but optimal adjustment.

Table 12. CONSEQUENCES OF 20% ROYALTY ADJUSTMENT ON UTILITIES CUSTOMERS[1]

Item	Present Electric Bill $/Month[2]	Additional Cost $/Month[3]
1. Arizona Public Service		
a. 1964 Lease	61.00	
b. 20% Adjustment	61.23	0.23
2. LADWP		
a. 1964 Lease	49.72	
b. 20% Adjustment	49.99	0.27
3. Salt River Project		
a. 1964 Lease	57.48	
b. 20% Adjustment	57.99	0.51
4. Nevada Power		
a. 1964 Lease	42.40	
b. 20% Adjustment	43.04	0.64
5. Southern Cal Edison		
a. 1964 Lease	54.03	
b. 20% Adjustment	54.11	0.08

[1] It is assumed that all extra cost is shifted to the utility customers.
[2] Table 5.
[3] Tables 10 and 11.

February 25, 1985

Mr. John W. Fritz
Deputy Assistant Secretary -
Indian Affairs (Operations)
U.S. Department of the Interior
18th & C Streets, N.W.
Washington, D.C. 20240

Re: Peabody Appeal - Lease #14-20-0603-8580
Letter from Appellants dated February 22, 1985

Dear Mr. Fritz:

The Navajo Tribe vigorously opposes the proposal embodied in the February 22, 1985 letter of appellants, which would delay a decision by your office for at least an additional six weeks. Although it is understandable that the appellants would like to continue to pay a royalty of 1.88% for as long as possible, the regulations of the Department require action on this appeal to be taken within 30 days of the filing of the Navajo Tribe's brief, or March 2, 1985. 25 C.F.R. §2.19. Duly promulgated regulations have the force and effect of law. See, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).

There are two issues in this appeal: (1) whether the Area Director's actions were timely and (2) whether appellants have shown that the adjustment is not reasonable. Both of these questions must be answered against appellants as a matter of law. Appellants state generally that the Navajo Tribe has made inaccurate or irrelevant assertions of fact. Appellants do not, however, identify any fact that is erroneous, nor do they relate the purported erroneous fact to the resolution of

either of the two issues. (1) There is simply no showing that there is any need to depart from the regulations.

Respectfully yours,

By: Paul E. Frye
Staff Attorney
NAVAJO NATION DEPARTMENT
OF JUSTICE
P.O. Drawer 2010
Window Rock, Arizona 86515

(1) If an assertion of fact is truly irrelevant, the Navajo Tribe expects that the Department will ignore it.

cc: Frederick J. Marton, Esq.
Thomas J. Reilly, Esq.
Gregory J. Leisse, Esq.
Interior Board of Indian Appeals

PEF: daw

UNITED STATES GOVERNMENT

memorandum

DATE: February 26, 1985

REPLY TO ATTN OF: Vijai N. Rai, Geologist, Energy & Mineral Resources, Lakewood, CO

SUBJECT: Disputed Navajo Coal Royalty Rate Determination for Lease No. 14-20-0603-8580

TO: Office of the Solicitor - Division of Indian Affairs

Attention: Colleen Kelley

THROUGH: Chief, Division of Energy and Mineral Resources

This is in response to your request dated February 6, 1985, asking our assistance and opinion regarding the coal royalty rate determination by the Area Director for Navajo Tribe lease No. 14-20-0603-8580. On June 18, 1984, the Navajo Area Director issued a decision adjusting the royalty rate to 20% of the gross value of the coal under the subject lease.

The essential features of the lease which was entered into by the respective parties on February 1, 1964, and approved on August 28, 1964, are as follows:

1. Acreage: 24,858 acres
2. Primary Term: ". . . . .10 years from the date of approval and for so long thereafter as the substances produced

are being mined by the lessee in accordance with its terms in paying quantities . . . . ."

3. Royalty Payment:
   a. If the average monthly gross realization for the company is less than $4.00/ton, royalty will be at a rate of 25¢/ton for all coal sold and utilized off the reservation, and 20¢/ton for coal sold on the reservation.
   b. If the average monthly gross realization is between $4.00 and $5.00/ ton, royalty will be at a rate of 30¢/ton for all coal sold and utilized off the reservation and 24¢/ton for coal sold on the reservation.
   c. If the average monthly gross realization is $5.00/ton or more, royalty will be at a rate of 37 1/2¢/ ton for all coal sold and utilized off the reservation and 30¢/ton for coal sold on the reservation.

   The term "average monthly gross realization" means the average price of coal produced under the terms of the lease FOB lessee's mine and is determined by dividing the sum of money received for coal and sold during a month by the sum total of tons sold during such month.

The price sold to an affiliate or subsidiary of the lessee is not acceptable.
(Article IV)

4. Provision Authorizing Royalty Rate Adjustment:

   "During the period that the land so leased is under federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter." (Article VI) (Underlined for emphasis)

The Navajo Area Director, pursuant to his delegated authority to make a "reasonable adjustment" of the royalty terms of Article VI of the said lease, notified Peabody of the adjustment of the royalty to 20% of the gross value of the coal mined. This determination is currently being disputed by Peabody Coal Company (Peabody).

We have reviewed and evaluated six (6) reports that have discussed the issue of royalty rate for coal under the subject lease. In addition, we have examined various justifications for royalty rate determinations presented in the briefs by the respective parties. The royalty rates that have been proposed in these reports are as follows:

1. The Peterson and Company in a report dated November 28, 1984, and prepared at the request

of Peabody proposed a royalty rate between 5.57% to 7.16%. The report concluded that such a rate will restore the benefits that were originally contemplated when the 1964 lease was signed by both parties.

2. Peabody Coal Company - Arizona Division in a report dated September 15, 1982 concluded that the royalty rate proposed by Peabody on December 28, 1981, is equitable. On that date, Peabody offered to raise the royalty rate to 12.5% on gross sales without deduction for coal under the lease currently under dispute, which contains an adjustment clause, and also offered to raise the royalty on Lease No. 9910 (which has no adjustment clause) from 6.67% to 12.5%. This report also questioned the validity of data used in the Schwab Report which was prepared for the Navajo Tribe and is discussed below.

3. The F.R. Schwab & Associates, Inc. in a report dated April 12, 1982, and prepared for the Navajo Tribe recommended a royalty rate of 12 to 16 cents per million BTU; this value is equivalent to $2.64 to $3.52 per ton for all coal mined under the lease. Assuming the sales price of coal was $15.46/ton at the time the report was written, the royalty rate recommended in the report will range between 17.08% to 22.77%. This report is based on a comparative sales approach (analysis of market data); and (2) the income of earnings approach, also known as discounted cash flow analysis.

4. The Council of Energy Resource Tribes (CERT) in a report prepared for the Navajo Tribe stated

that a royalty rate of between 15% and 20% would be "completely justifiable." The rate recommended is based on a discounted cash flow rate of return (DCFROR) model. In a subsequent report dated January 1985, CERT recommended a 20% royalty rate.

5. The United States Bureau of Mines in a report dated June 6, 1984, and prepared at the request of the Energy and Mineral Resource Division of the Bureau of Indian Affairs, recommended a royalty rate of 20%. This recommendation is also based on a discounted cash flow rate of return (DCFROR) model.

6. The Energy and Mineral Resource Division, Bureau of Indian Affairs in a memorandum dated June 6, 1984, to the Navajo Area Director recommended a royalty rate of 24.44%. This computation utilized data from reports prepared by CERT and the Bureau of Mines as well as data from some other sources.

The royalty rates recommended in various reports range from a low of approximately 17% to a high of 24.44%.

Peabody, in its brief, disagrees with the Area Director's adjustment of the royalty rate to 20 percent of the gross value of the coal mined under lease. Peabody contends that a "reasonable adjustment" to the royalty provisions in the lease requires an adjustment sufficient to preserve to the parties to the lease their reasonable expectations regarding the royalties that would be paid by Peabody to the Navajo Tribe over the term of the lease.

Peabody, therefore, contends that any adjustment to the royalty rate by the Area Director should preserve the benefit of the bargain struck by the parties in 1964, with the Navajo Tribe receiving neither more nor less than the royalties that the Tribe could reasonably have anticipated receiving in 1964 for the 200 million tons of coal sold to Peabody.

Such an interpretation of the "reasonable adjustment" provision of the lease, however, is inconsistent with the underlying reasons for that provision in that lease and does not fully comprehend the economic realities and consequences of a leasing transaction.

The "reasonable adjustment" provision provides the royalty owner (landowner) the opportunity to periodically adjust the royalty rate either up or down, if the market and economic conditions so dictate.

It also assures the royalty owner a reasonable and equitable share of the gross income from mining over the life of the lease. Since the royalty owner continues to hold an economic interest in the mineral in place throughout the life of the lease and looks for his share of the income from the extraction for a return of his capital, it is in his best interest to have such a provision in the lease. It is even more critical, if the royalty owner believes the price of his mineral product, and therefore the value of his share of the gross income from property is likely to increase in the future.

The price that Peabody received for the coal extracted from the leased land increased from $2.81/ton in 1972 to $17.35/ton in 1983. Such an increase is considerably higher than either the increase in the cost of mining or the Consumer Price Index (CPI) during that period. As a consequence, Peabody's share of the income from it

operation on the leased land was considerably higher than Peabody's most likely anticipated expectations in 1964. No one at that time envisioned such a dramatic increase in the price of coal and other energy resources during the 1970's.

The Tribe's share of income from extraction of that coal during that period, however, was, on a per ton basis, actually lower than its most likely anticipated expectations (The Tribe received a fixed price/ton as royalty and during that period the value of the dollar dropped substantially in response to unexpected high inflation rate).

The "reasonable adjustment" provision in the lease is specifically for the purpose of making adjustments to prevent such inequities. We believe that it is within the Area Director's purview to adjust the royalty rate at the end of the 20 year term and is clearly provided in the lease. Therefore, the real issue is not whether the royalty rate can be adjusted upward if the market and economic conditions clearly so dictate but by how much.

A 20% royalty is reasonable based on the discounted cash flow rate of return (DCFROR) analysis and the comparative sales approach (market analysis) that were utilized in various reports written on or behalf of the Tribe. However, since the revenue, investment, and cost projections were based on estimate, and not on an actual data from Peabody, there is a possibility of error with respect to projections involving Peabody's DCFROR. The DCFROR method is based on certain fundamental and basic assumptions which involve estimating future operating and investment costs, taxes and other expenses. In addition, the result must be discounted to reflect the fact that the dollar earned in the future will be worth less than the present dollar.

In the absence of actual data from Peabody with respect to sales price, operating and investment costs, taxes, and other expenses on which future projection involving these items are made, the accuracy of the projections is questionable. For example, the operating costs in CERT's projection are considerably higher than the one used in the U.S. Bureau of Mines Report ($10.80/ton vs. $8.55/ton, including $3.33/ton capital cost). This represents a substantial difference in the operating cost when multiplied by the total tons mined (nearly nine million tons/yr.), and consequently would affect the DCFROR projections in these reports. In addition, data with respect to cost and other expenses should have been verified and substantiated with data involving these items in Keystone or other publications.

Similarly, the part of the data base used in comparable sales method by Schwab and Associates to determine an equitable royalty rate for the leased coal is also questionable. This method of valuation requires that the comparable sales data to be relied on be specifically comparable with respect to a number of key factors, such as, location with respect to market and transportation, physical characteristics of the coal (BTU, sulfur, ash, etc.), cost of production (surface vs. underground, overburden ratio, multiple seams, production techniques, etc.), size of reserve, size of production, etc.

Determining a royalty rate for the Navajo coal by comparing the royalty rate for eastern coal, or metallurgical coal, or coal that is being extracted by different production techniques than the one used at the Navajo lease are also questionable and Peabody is justified in pointing these inconsistencies.

However, Peabody has not provided any specific data which refutes the specific DCFROR projections or the

estimated value of the coal reserves under lease. For example, the thickness of the coal seams, the thickness of the overburden, the overburden and recovery ratios, the size of the coal reserves and its quality, the size of production, marketability, etc. all indicate that the coal reserve under lease to Peabody is extremely valuable. These factors also indicate that the royalty rate for this coal deposit should be much higher than the 12.5% that the Federal Government receives for surface-mined coal. Furthermore, although based on estimates, all the reports involving royalty rate determinations indicate that the DCFROR for Peabody's operations on the leased land are extremely high. In addition, because Peabody has been assured of a 15% DCFROR by the consortium of utilities that buy that coal, it can pass on any increase in the royalty rate to its customers without affecting its DCFROR. Furthermore, the reports involving the royalty rate determinations also indicate that the consumers, who ultimately purchase the power that is generated from the coal mined from the leased land, will also not be adversely affected.

In summary, based on data currently available, a 20% royalty rate determination appears reasonable and defensible. In the appeal decision, we recommend that the Area Director's 20% royalty rate determination be sustained. However, Peabody should be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable. If Peabody were to provide the actual data with respect to its cost, investment, and revenues, the Bureau of Indian Affairs should reevaluate its royalty rate determination in light of such data. Such data, however, must include information not only with respect to Peabody's mining operation, but also with

respect to the overriding royalties that it pays to its wholly-owned leasing subsidiary – The Sentry Royalty Company. This information is significant because the acquisition of a lease interest in coal is nearly always structured so as to qualify a part of the future income from mining under section 631(c) of the Internal Revenue Code by having a company other than the one that will do the actual mining of the coal, acquire the reserves and sublease them for a retained arms-length overriding royalty, to a related mining company. Under such an arrangement, the parent company receives the benefits of both the percentage and cost depletion as well as the preferential capital gains treatment on royalties paid to its leasing entity.

AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz and Robert L. Davidoff

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AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz[1] and Robert L. Davidoff[2]

*** INTRODUCTION

Bureau of Mines (BOM) personnel evaluated the economics of the coal mining operation within the Kayenta Lease Area. This evaluation was based on information provided in the Kayenta Mine Plan submitted to the Office of Surface Mining (OSM) by the Peabody Coal Company, Inc. The intent of this study was to arrive at a reasonably site specific estimate of the capital and operating costs incurred by the Peabody Coal Company at the Kayenta Mine. Also, sensitivity analyses were performed to determine the impact of varying royalty rates and coal selling prices on the profitability of this project. Furthermore, the impact of state taxes was considered in this evaluation.

The capital and operating cost estimates were based on data obtained from the Kayenta Mine Plan. For example, the following mine plan information was used to arrive at a site specific cost estimate:

1) Major equipment list
2) Recent crusher and conveyor installations
3) Reclamation cost estimates

[1] Mining Engineer, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[2] Mineral Economist, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

4) Operating parameters (seam thickness, overburden depth, pit width, etc.)

5) Methods and sequence of mining activities (drilling and blasting, overburden removal, coal removal, etc.)

*** ENGINEERING COST EVALUATION METHODOLOGY

The engineering cost evaluation included estimates of all the relevant capital and operating costs for the Kayenta Mine. These cost estimates were based on both the operating parameters and procedures specified in the Kayenta Mine Plan. Capital expenditures were calculated for continued development, equipment replacement and constructing a crusher and conveyor facility (specifically the J-28 crusher facility as detailed in the Kayenta Mine Plan). The capital reinvestment expenditures for mine plant and equipment included the costs for replacing mobile and stationary equipment, and took into consideration the depreciable life of various equipment classifications. It was also determined that $100,000,000 of remaining capital from investments in mine plant and equipment prior to 1984 would be a close approximation of the remaining book value.

The operating cost estimate for this mine includes both direct and indirect costs. The direct operating cost includes: production and maintenance labor, supervision, supplies, utilities, reclamation and payroll overhead. The indirect operating costs include such items as: administrative costs, facilities maintenance and supplies.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT CAPITAL COSTS

The capital cost for the walking draglines was estimated using information provided in a thesis by M. J. Ryan (*1*)[3]. Reach requirements for the draglines were taken from the Kayenta Mine Plan. Capital costs for the other mining equipment used at the Kayenta Mine were estimated using information obtained from Dataquest, Inc.(*2*).

An equipment replacement schedule was developed using information provided in a Bureau of Mines Information Circular (*3*). In developing this schedule, consideration was also given to the equipment usage and operating procedures practiced at this mine. For each major piece of equipment, an estimate of operating life was made. Reinvestments were scheduled according to the equipment life and the remaining mine life (see table 1). Pit electrical equipment requirements were assumed base on a BOM Information Circular (*3*).

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT OPERATING COSTS

The operating costs for mobil mining equipment and coal loading shovels were determined using information provided by Dataquest, Inc. (*4*). Dragline operating costs were derived from information provided in a thesis by M.J. Ryan (*1*). In general, the individual operating costs for each type and model of equipment were determined on a per hour basis. The components of these costs included: replacement parts, fuel or

[3] Underlined numbers in parentheses refer to items in the list of references at the end of this report.

electricity, lubricants, tires and ground engaging components. The labor costs for operation and maintenance of the equipment were calculated in a separate manning schedule.

The work schedule for determining personnel requirements was as follows:

- 240 days per year or 220 days per year for support activities
- 3 shifts per day for overburden removal
- 2 shifts per day for coal production and support activities

Total annual operating costs were determined by multiplying the annual operating hours by the operating cost per hour for each type of equipment. Equipment was assumed to be available and used for 75 pct of an 8-hour shift; it should be understood that actual usage may vary depending on such factors as production schedule and the mine logistics.

TABLE 1. - Estimated Kayenta Mine investment and production stream for the remaining economic mine life

Year	Item	Cost/Production
1984-1999	Development costs	$2,000,000 per year
1984-1998	Annual coal production	8,3000,000 tons[1]
1999-1999	Annual coal production	7,553,596 tons[1]
1984-1999	Mine operating cost	$5.89 per ton
1984-1999	Reclamation - black lung	$0.85 per ton
1984	Remaining capital from prior years investments	$100,000,000
1984	Mine equipment reinvestment	25,320,000
1985	...do	26,173,900
1986	...do	27,294,700
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1996	...do	11,352,100
1997	...do	10,166,200
1998	...do	17,594,400
1999	...do	6,000,000
1984	Mine plant investment	3,450,000
1984	Working capital	8,921,0000

[1] All tonnage figures in the report are short tons.

METHODOLOGY USED FOR DETERMINING PERSONNEL COSTS

The personnel required for this operation was determined using information from the Kayenta Mine Plan as well as a BOM Information Circular (*3*). Personnel were broken down into the following categories: union production, union maintenance, general labor and salaried personnel. Salaried personnel included: production foreman, maintenance foreman, mine management, engineering, clerical and support staff.

The production personnel were determined by staffing the equipment according to the coal production rate and operating procedures that are in place at the Kayenta Mine. The required union maintenance personnel were determined in part from the operating procedures specified by the Peabody Coal Company, Inc. and in part from a BOM Information Circular (*3*). The remaining personnel were estimated from the same information circular. The 1984 Keystone Coal Industry Manual reports that employment at the Kayenta Mine equaled 533 people. This study estimates the staffing requirements at 451 people. If the Keystone figure is used, then additional labor cost of approximately $0.60 per ton could be incurred.

Union personnel costs were determined by using the March 1984 standard hourly wage rates for 8-hour shift mines found in a 1984 Western Surface Agreement between a western coal mining company and the International Union of United Mine Workers of America. Both job specific wage rages and shift differentials were used to arrive at these costs (see table 2).

The Kayenta Mine is assumed to operate three 8-hour shifts per day and 240 days per year. Fringe benefits for all personnel were assumed

TABLE 2. - Manning schedule

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Production:				
Dragline Operator[1]	12	136.80	399	
Dragline Oiler[1]	12	131.68	385	
Dragline Groundman[1]	12	131.68	385	
Dragline Welder[1]	12	131.68	385	
Bulldozer Operator[1]	75	131.68	2,404	
Drillers[2]	28	128.24	801	
Driller Helper[2]	28	124.16	777	
Shooter (Overburden)[2]	4	128.24	114	
Scraper Operator[2]	6	128.24	171	
Shovel Operator[1]	8	136.80	265	
Shovel Oiler[1]	8	131.68	255	
Loader Operator[1]	24	131.68	765	
Shooter (Coal)[2]	4	128.24	114	
Pitman[1]	8	131.68	255	
Truckdriver (Explosives)[1]	4	128.24	124	
Truckdriver (Coal)[1]	30	128.24	946	
Total	275		8,545	$1.03
Maintenance:[2]				
Road Grader	6	131.68	175	
Water Truck Driver	2	128.24	57	
Lubrication Truck Driver	6	128.24	171	
Supply Truck Driver	6	128.24	171	
Mechanic	40	138.16	1,191	
Electrician	30	134.16	893	
Machinist	18	134.16	525	
Welder	18	134.16	536	
Total	126		3,719	$0.45
Utility:[2]				
Utilityman	12	104.48	294	$0.04
Salary:				
Superintendant	1	50,000.00	50	
General Pit Foreman	2	35,000.00	70	
Pit Foreman	9	30,000.00	270	
Maintenance Superintendant	1	35,000.00	35	
Maintenance Foreman	6	30,000.00	180	
Mining Engineer	3	35,000.00	105	
Safety Inspector	4	25,000.00	100	
Office Manager	1	25,000.00	25	
Purchasing Agent	1	25,000.00	25	

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TABLE 2. - Manning schedule—Continued

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Salary—Continued				
Timekeeper	2	20,000.00	40	
Bookkeeper	2	20,000.00	40	
Warehouseman	6	15,000.00	90	
Total Supervision	38		$ 1,030	$0.12
Total Labor and Supervision	451		$13,585	$1.64

[1]240 days/year.
[2]220 days/year.
[3]Shift differentials are included in annual costs.

at 32 pct of the total personnel costs. The percentage of salaried personnel costs is approximately 7 pct of the total manpower costs.

METHODOLOGY USED FOR DETERMINING RECLAMATION COSTS

Reclamation costs were based on figures included in the Kayenta Mine Plan modified for the J-21 pit development. A cost of $0.60 per ton of coal was used for this estimate. This would roughly translate into a cost of $12,500 per acre of mined land. However, if the reclamation cost estimates for the J-21 pit were to include both mined land and associated disturbed areas, then reclamation would cost $27,087 per acre of mined land or approximately $1.30 per ton of coal. Reclamation cost estimates using information provided in a handbook developed by Straam Engineers, Inc. (*5*) indicates a range from $5,000 to $10,000 per acre. Thus, the cost of $12,500 per acre was considered to be reasonable and was used in the estimate.

*** SENSITIVITY ANALYSIS RESULTS

Sensitivity analyses were conducted to determine the effects of several factors on the project economics of the Kayenta Mine. The factors that were considered are as follows:

1. Royalty rate: Range: 10.0 to 20.0 pct of gross sales
2. Coal Selling Price: Range - $16 to $18 per ton of coal
3. The impact of State taxes (property, severance and income tax)

The project was evaluated in both constant January 1984 dollars and under a general inflation rate of 5% per year for the entire property life. These assumptions

were made for the purpose of comparability with the results of a prior evaluation (*6*). Table 3 lists the royalty amounts paid to the tribe while varying the royalty rates and coal selling price. Table 4 demonstrates the effects of increasing the royalty rates and coal selling prices on the project Discounted Cash Flow Rate of Return (DCFROR). Table 5 represents the effects of varying coal selling prices and royalty rates on the project DCFROR when only Federal taxes are considered. Table 6 illustrates the impact of price and royalty rate changes on the project's State and Federal tax burden. Since royalties are an allowable deduction for State and Federal income tax determination, any increase in the royalty payment would reduce taxable income and therefore reduce the tax burden on the property. Finally, tables 7-9 depict the effects of a 5-pct rate of inflation on the amount of royalties paid to the tribe and on the rates of return to the company while varying the coal selling price and royalty rates.

By examining the succeeding tables, the following inferences my be made:

1. A change in the royalty rate from 12.5 pct to 20.0 pct will reflect a cost increase of between $1.20 to $1.35 per ton assuming that the coal selling price is between $16 and $18 per ton (table 3).

2. At a 12. pct royalty rate, a change in the coal selling price from $16 per ton to $17 per ton (6.25 pct increase) will increase the DCFROR from 21.6 pct to 26.1 pct (21 pct change) (see table 4).

3. At a 12.5 pct royalty rate, the inclusion of state taxes in the analysis would decrease the

project DCFROR by 13.6 pct (from 25.0 pct to 21.6 pct at a price of $16 per ton) (tables 4 and 5).

4. As can be seen by comparing table 4 with table 8, the project DCFROR increases under an inflation rate. For example, at a $16 per ton coal selling price and with a royalty rate of 12.5 pct, the DCFROR would increase from 21.6 pct to 25.4 pct (all taxes are applied).

TABLE 3. - Royalties over the life of the property using constant 1984 dollars

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	10.0	211,286	1.60
	12.5	264,107	2.00
	15.0	316,929	2.40
	17.5	369,750	2.80
	20.0	422,572	3.20
17.00	10.0	224,491	1.70
	12.5	280,614	2.12
	15.0	336,737	2.55
	17.5	392,859	2.97
	20.0	448,982	3.40
18.00	10.0	237,696	1.80
	12.5	297,121	2.25
	15.0	356,545	2.70
	17.5	415,969	3.15
	20.0	475,393	3.60

[1] All royalties are rounded to the nearest thousand.

TABLE 4. - DCFROR and Net Present Value (N.P.V.) at varying prices and royalty rates using constant 1984 dollars

	All State and Federal Taxes Included		
Price ($/ton)	Royalty Rate (Pct)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	23.7	28,727
	12.5	21.6	18.014
	15.0	19.3	6,848
	17.5	17.0	-5,093
	20.0	14.5	-18,243
17.00	10.0	28.4	51,650
	12.5	26.1	40,612
	15.0	23.8	29,417
	17.5	21.6	18,032
	20.0	19.2	6,133
18.00	10.0	33.2	73,654
	12.5	30.8	62,470
	15.0	28.3	51,031
	17.5	25.9	39,323
	20.0	23.4	27,437

[1] Discount rate equals 18 pct.

TABLE 5. - DCFROR and N.P.V. at varying prices and royalty rates using constant 1984 dollars and only Federal income tax included

Price ($/ton)	Royalty Rate (Pct)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	27.4	46,461
	12.5	25.0	35,082
	15.0	22.7	23,557
	17.5	20.3	11,843
	20.0	17.9	-383
17.00	10.0	32.8	71,230
	12.5	30.2	59,658
	15.0	27.7	47,871
	17.5	25.2	35,800
	20.0	22.7	23,557
18.00	10.0	38.4	95,438
	12.5	35.5	83,370
	15.0	32.8	71,230
	17.5	30.1	58,976
	20.0	27.4	46,461

[1] Discount rate equals 18 pct.

TABLE 6. - Average annual tax burden over property life using constant 1984 dollars varying prices and royalty rates

Price ($/ton)	Royalty Rate (%)	State Tax[1] ($000)	$/ton	Federal Tax ($000)	$/ton
16.00	10.0	10,132	1.23	6,492	0.79
	12.5	9,860	1.19	5,479	0.66
	15.0	9,600	1.16	4,488	0.54
	17.5	9,351	1.13	3,519	0.43
	20.0	9,118	1.10	2,580	0.31
17.00	10.0	10,961	1.33	8,760	1.06
	12.5	10,652	1.29	7,646	0.93
	15.0	10,354	1.25	6,552	0.79
	17.5	10,065	1.22	5,476	0.66
	20.0	9,790	1.19	4,426	0.54
18.00	10.0	11,843	1.43	11,186	1.36
	12.5	11,492	1.39	9,921	1.20
	15.0	11,147	1.35	8,690	1.05
	17.5	10,822	1.31	7,514	0.91
	20.0	10,508	1.27	6,359	0.77

[1] Includes property, severance and state income taxes.

TABLE 7. - Total royalties paid over the life of the property varying selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	10.0	311,689	2.36
	12.5	389,611	2.95
	15.0	467,533	3.54
	17.5	545,455	4.13
	20.0	623,374	4.72
17.00	10.0	311,169	2.51
	12.5	413,962	3.13
	15.0	496,754	3.76
	17.5	579,546	4.39
	20.0	662,339	5.02
18.00	10.0	350,650	2.66
	12.5	438,312	3.32
	15.0	525,975	3.98
	17.5	613,637	4.65
	20.0	701,300	5.31

[1] All royalties are rounded to the nearest thousand.

TABLE 8. - DCFROR and N.P.V. are varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	27.5	58,573
	12.5	25.4	45,697
	15.0	23.2	32,281
	17.5	20.9	18,174
	20.0	18.5	3,102
17.00	10.0	32.2	86,121
	12.5	29.9	72,809
	15.0	27.7	59,403
	17.5	25.4	45,730
	20.0	23.1	31,450
18.00	10.0	37.1	113,184
	12.5	34.6	99,389
	15.0	32.1	85,385
	17.5	29.7	71,273
	20.0	27.3	57,072

[1] All N.P.V. figures are rounded to the nearest thousand.

TABLE 9. - DCFROR and N.P.V. at varying prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal income tax included

Coal Selling Price ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[1] ($1,000)
16.00	10.0	31.3	80,655
	12.5	28.9	66,944
	15.0	26.6	53,126
	17.5	24.3	38,913
	20.0	21.9	24,158
17.00	10.0	36.8	111,088
	12.5	34.2	96,789
	15.0	31.6	82,366
	17.5	29.1	67,802
	20.0	26.6	53,126
18.00	10.0	42.4	140,949
	12.5	39.5	126,101
	15.0	36.8	111,088
	17.5	34.0	95,948
	20.0	31.3	80,655

[1] All N.P.V. figures are rounded to the nearest thousand.

*** CONCLUSIONS

The purpose of the study had a two-fold nature. First, to develop capital and operating costs that would realistically depict the actual costs involved at the Kayenta Mine. Secondly, to analyze the impact of changing coal prices, varying royalty rates and the inclusion of state taxes on the profitability of this project as measured by the DCFROR method. To develop reasonable capital and operating cost estimates, site specific information was obtained from several sources including the Kayenta Mine Plan submitted to the Office of Surface Mining. Also, operating procedures detailed in this mine plan were considered in the development of the operating cost estimate.

Several inferences concerning the impact of price, royalty rates and taxes have been brought out in this study. Under the price and royalty rate ranges investigated by this study, the DCFROR ranged from 14.5 pct to 33.2 pct when state taxes were applied and constant 1984 dollars were been used. The lowest project return (DCFROR = 14.5 pct) occurred at a price and royalty rate of $16 per ton and 20 pct, respectively. Alternatively, the highest project return (DCFROR = 33.2 pct) occurred at a price of $18 per ton and a 10 pct royalty. Further insite on the relationships between the above-mentioned parameters and the project profitability may be gained through a more detailed examination of these tables.

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ADDENDUM TO AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz and Robert L. Davidoff

May 6, 1985

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AN ENGINEERING AND ECONOMIC ANALYSIS OF THE KAYENTA LEASE AREA

By Philip C. Perlewitz[1] and Robert L. Davidoff[2]

*** INTRODUCTION

Bureau of Mines (BOM) personnel evaluated the economics of the coal mining operation within the Kayenta Lease Area. The intent of this study was to arrive at a more site specific estimate of the capital and operating costs incurred by the Peabody Coal Company at the Kayenta Mine as compared to those costs presented in a previous study[3]. The previous study, performed at the request of the BIA, presented a number of possible scenarios portraying costs at different orders of magnitude. This report (dated 5/6/85), requested to provide a more detailed analysis of the actual cost basis of the operation, was based on information provided in the Kayenta Mine Plan submitted to the Office of Surface Mining (OSM) by the Peabody Coal Company, Inc. Sensitivity analyses were performed to determine the impact of varying royalty rates and coal selling prices on the profitability of this project. Furthermore, the impact of state taxes was considered in this evaluation.

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[1] Mining Engineer, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[2] Mineral Economist, Minerals Availability Field Office, Bureau of Mines, Denver, CO.

[3] Previous study entitled "Analysis of the Financial Aspects of a Reevaluation of the Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc.". Prepared by Minerals Availability Field Office, U.S. Bureau of Mines. June 6, 1984.

The capital and operating cost estimates were based on data obtained from the Kayenta Mine Plan. For example, the following mine plan information was used to arrive at a site specific cost estimate:

1) Major equipment list
2) Recent crusher and conveyor installments
3) Reclamation cost estimates
4) Operating parameters (seam thickness, overburden depth, pit width, etc.)
5) Methods and sequence of mining activities (drilling and blasting, overburden removal, coal removal, etc.)

*** ENGINEERING COST EVALUATION METHODOLOGY

The engineering cost evaluation included estimates of all the relevant capital and operating costs for the Kayenta Mine. These cost estimates were based on both the operating parameters and procedures specified in the Kayenta Mine Plan. Capital expenditures were calculated for continued development, equipment replacement and constructing a crusher and conveyor facility (specifically the J-28 crusher facility as detailed in the Kayenta Mine Plan). The capital reinvestment expenditures for mine plant and equipment included the costs for replacing mobile and stationary equipment, and took into consideration the depreciable life of various equipment classifications. It was also determined that $100,000,000 of remaining capital from investments in mine plant and equipment prior to 1984 would be a close approximation of the remaining book value.

The operating cost estimate for this mine includes both direct and indirect costs. The direct operating cost includes: production and maintenance labor, supervision, supplies, utilities, reclamation and payroll overhead. The indirect operating costs include such items as: administrative costs, facilities maintenance and supplies.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT CAPITAL COSTS

The capital cost for the walking draglines was estimated using information provided in a thesis by M. J. Ryan (*1*)[4]. Reach requirements for the draglines were taken from the Kayenta Mine Plan. Capital costs for the other mining equipment used at the Kayenta Mine were estimated using information obtained from Dataquest, Inc. (*2*).

An equipment replacement schedule was developed using information provided in a Bureau of Mines Information Circular (*3*). In developing this schedule, consideration was also given to the equipment usage and operating procedures practiced at this mine. For each major piece of equipment, an estimate of operating life was made. Reinvestments were scheduled according to the equipment life and the remaining mine life (see table 1). The type of depreciation used was ACRS for all plant and equipment. Pit electrical equipment requirements were assumed based on a BOM Information Circular (*3*). For the years 1984, 1985 and 1986, a financing scenario of 30:70 (debt/equity ratio was used at a loan interest rate of 12 pct. All investments after that period were financed at 100 pct equity).

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[4] Underlined numbers in parentheses refer to items in the list of reference at the end of this report.

METHODOLOGY USED FOR DETERMINING MINE EQUIPMENT OPERATING COSTS

The operating costs for mobile mining equipment and coal loading shovels were determined using information provided by Dataquest, Inc. (*4*). Dragline operating costs were derived from information provided in a thesis by M. J. Ryan (*1*). In general, the individual operating costs for each type and model of equipment were determined on a per hour basis. The components of these costs included: replacement

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Year	Item	Cost/Production
1984-1999	Development costs	$2,000,000 per year
1984-1998	Annual coal production	8,3000,000 tons[1]
1999-1999	Annual coal production ...	7,553,596 tons[1]
1984-1999	Mine operating cost	$5.89 per ton
1984-1999	Reclamation - black lung ...	$0.85 per ton
1984	Remaining capital from prior years investments	$100,000,000
1984	Mine equipment reinvestment .	25,320,000
1985	...do	26,173,900
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- 240 days per year for production and 220 days per year for support activities
- 3 shifts per day for overburden removal
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Total annual operating costs were determined by multiplying the annual operating hours by the operating cost per hour for each type of equipment. Equipment was assumed to be available and used for 75 pct of an 8-hour shift; it should be understood that actual usage may vary depending on such factors as production schedule and the mine logistics (see table 2).

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The personnel required for this operation was determined using information from the Kayenta Mine Plan as well as a BOM Information Circular (*3*). Personnel were broken down into the following categories: union production, union maintenance, general labor and salaried personnel. Salaried personnel included: production foremen, maintenance foremen, mine management, engineering, clerical and support staff.

The production personnel were determined by staffing the equipment according to the coal production rate and operating procedures that are in place at the

Kayenta Mine. The required union maintenance personnel were determined in part from the operating procedures specified by the Peabody Coal Company, Inc. and in part from a BOM Information Circular

TABLE 2. - Manning schedule and equipment operating costs

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Production:				
Dragline Operator[1]	12	136.80	399	
Dragline Oiler[1]	12	131.68	385	
Dragline Groundman[1]	12	131.68	385	
Dragline Welder[1]	12	131.68	385	
Bulldozer Operator[1]	75	131.68	2,404	
Drillers[2]	28	128.24	801	
Driller Helper[2]	28	124.16	777	
Shooter (Overburden)[2]	4	128.24	114	
Scraper Operator[2]	6	128.24	171	
Shovel Operator[1]	8	136.80	265	
Shovel Oiler[1]	8	131.68	255	
Loader Operator[1]	24	131.68	765	
Shooter (Coal)[2]	4	128.24	114	
Pitman[1]	8	131.68	255	
Truckdriver (Explosives)[1]	4	128.24	124	
Truckdriver (Coal)[1]	30	128.24	946	
Total	275		8,545	$1.03
Maintenance:[2]				
Road Grader	6	131.68	175	
Water Truck Driver	2	128.24	57	
Lubrication Truck Driver	6	128.24	171	
Supply Truck Driver	6	128.24	171	
Mechanic	40	138.16	1,191	
Electrician	30	134.16	893	
Machinist	18	134.16	525	
Welder	18	134.16	536	
Total	126		3,719	$0.45
Utility:[2]				
Utilityman	12	104.48	294	$0.04
Salary:				
Superintendant	1	50,000.00	50	
General Pit Foreman	2	35,000.00	70	
Pit Foreman	9	30,000.00	270	
Maintenance Superintendant	1	35,000.00	35	
Maintenance Foreman	6	30,000.00	180	
Mining Engineer	3	35,000.00	105	
Safety Inspector	4	25,000.00	100	
Office Manager	1	25,000.00	25	
Purchasing Agent	1	25,000.00	25	

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TABLE 2. - Manning schedule and equipment operating costs—Continued

Personnel	Total	Wages per Day or Annual Salary	Cost per Year[3] ($1,000)	Cost per Ton
Salary—Continued				
Timekeeper	2	20,000.00	40	
Bookkeeper	2	20,000.00	40	
Warehouseman	6	15,000.00	90	
Total Supervision	38		$ 1,030	$0.12
Total Labor and Supervision	451		$13,588	$1.64
Operating Cost:				
Draglines			$ 5,576	0.67
Shovels			725	0.09
Loaders			1,597	0.19
Dozers			3,017	0.36
Haulage Trucks			2,516	0.30
Remaining Equipment			2,743	0.33
Crusher			422	0.05
Conveying			2,702	0.33
Explosives			1,303	0.16
Miscellaneous (1.5%)			310	0.04
Total Operating Cost			$20,930	$2.52
Reclamation			$ 4,997	$0.60
Payroll Overhead (32%)			$ 4,254	0.51
Indirect Cost (15% labor and supplies)			$ 5,165	0.62
Black Lung Fees @ $0.50/ton			$ 4,150	0.50
Total			$53,084	$6.39

[1]240 days/year.
[2]220 days/year.
[3]Shift differentials are included in annual costs.

(*3*). The remaining personnel were estimated from the same Information Circular. The 1984 Keystone Coal Industry Manual reports that employment at the Kayenta Mine equaled 533 people. This study estimates the staffing requirements at 451 people. If the Keystone figure is used, the additional labor cost of approximately $0.60 per ton could be incurred.

Union personnel costs were determined by using the March 1984 standard hourly wage rates for 8-hour shift mines found in a 1984 Western Surface Agreement between a western coal mining company and the International Union of United Mine Workers of America. Both job specific wage rages and shift differentials were used to arrive at these costs (see table 2).

The Kayenta Mine is assumed to operate three 8-hour shifts per day and 240 days per year. Fringe benefits for all personnel were assumed at 32 pct of the total personnel costs. The percentage of salaried personnel costs is approximately 7 pct of the total manpower costs.

METHODOLOGY USED FOR DETERMINING RECLAMATION COSTS

Reclamation costs were based on figures included in the Kayenta Mine Plan modified for the J-21 pit development. A cost of $0.60 per ton of coal was used for this estimate. This would roughly translate into a cost of $12,500 per acre of mined land. However, if the reclamation cost estimates for the J-21 pit were to include both mined land and associate disturbed areas, then reclamation would cost $27,087 per acre of mined land or approximately $1.30 per ton of coal. Reclamation cost estimates using information provided in a handbook developed by Straam Engineers, Inc. (*5*) indicates a range from $5,000 to $10,000 per acre. Thus, the cost of $12,500 per acre was considered to be reasonable and was used in the estimate.

*** SENSITIVITY ANALYSIS RESULTS

Sensitivity analyses were conducted to determine the effects of several factors on the project economics of the Kayenta Mine. The factors that were considered are as follows:

1. Royalty rate: Range: 12.5 and 20.0 pct of gross sales
2. Coal Selling Price: Range - $16 to $18 per ton of coal
3. The impact of State taxes (property, severance and income tax)

The project was evaluated in both constant January 1984 dollars and under a general inflation rate of 5% per year for the entire property life. These assumptions were made for the purpose of comparability with the results of a prior evaluation (*6*). Table 3 lists the royalty amounts paid to the tribe while varying the royalty rates and coal selling price. Table 4 demonstrates the effects of varying the royalty rates and coal selling prices on the project Discounted Cash Flow Rate of Return (DCFROR) and Net Present Value (N.P.V.). Table 5 represents the effects of varying coal selling prices and royalty rates on the project DCFROR when only Federal income taxes are considered. Table 6 illustrates the impact of coal selling price and royalty rate changes on the project's State and Federal tax burden. Since royalties are an allowable deduction for State and Federal income tax determination, any increase in the royalty payment

would reduce taxable income and therefore reduce the tax burden on the property. Finally, tables 7-9 depict the effects of a 5-pct rate of inflation on the amount of royalties paid to the tribe and on the rates of return to the company while varying the coal selling price and royalty rates.

Table 10 illustrates an example summary of the pertinent data from each of the different analyses performed.

By examining the succeeding tables, the following inferences may be made:

1. A change in the royalty rate from 12.5 pct to 20.0 pct will reflect a cost increase of between $1.20 to $1.35 per ton assuming that the coal selling price is between $16 and $18 per ton (table 3).

2. At a 12.5 pct royalty rate, a change in the coal selling price from $16 per ton to $17 per ton (6.25 pct increase) will increase the DCFROR from 25.0 pct to 32.0 pct (28 pct change) (see table 4).

3. At a 12.5 pct royalty rate, the exclusion of state taxes in the analysis would increase the project DCFROR by 19.0 pct (from 25.0 pct to 29.7 pct at a price of $16 per ton) (tables 4 and 5).

4. As can be seen by comparing table 4 with table 8, the project DCFROR increases under an inflation rate. For example, at a $16 per ton coal selling price and with a royalty rate of 12.5 pct, the DCFROR would increase from 25.0 pct to 29.6 pct (all taxes are applied).

TABLE 3. - Total royalties paid over the life of the property using constant 1984 dollars, and at various coal selling prices

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	Total Royalties[1] ($1,000)	Royalties Dollars Per Ton
16.00	12.5	264,107	2.00
	20.0	422,572	3.20
17.00	12.5	280,614	2.12
	20.0	448,982	3.40
18.00	12.5	297,121	2.25
	20.0	475,393	3.60

[1] All royalties are rounded to the nearest thousand.

TABLE 4. - DCFROR and Net Present Value (N.P.V.) at varying coal selling prices and royalty rates using constant 1984 dollars

Coal Selling Price ($/ton)	All State and Federal Taxes Included: Royalty Rate (Pct of gross)	DCFROR (Pct)	N.P.V.[1,2] ($1,000)
16.00	12.5	25.0	29,316
	20.0	15.4	-11,962
17.00	12.5	32.0	55,538
	20.0	21.5	14,899
18.00	12.5	39.0	79,563
	20.0	27.9	40,412

[1] Discount rate equals 18 pct.

[2] Numbers rounded to nearest thousand

TABLE 5. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using constant 1984 dollars and only Federal Income Tax included

Coal Selling Price ($/ton)	Royalty Rate (Pct)	DCFROR (Pct)	N.P.V.[1,2] ($1,000)
16.00	12.5	29.7	47,415
	20.0	19.4	6,011
17.00	12.5	37.5	74,628
	20.0	26.2	34,090
18.00	12.5	44.9	99,596
	20.0	33.4	60,295

[1] Discount rate equals 18 pct.

[2] Numbers rounded to nearest thousand

TABLE 6. - Average annual tax burden over property life using constant 1984 dollars varying coal selling prices and royalty rates

Coal Selling Price ($/ton)	Royalty Rate (Pct of gross)	State Tax[1,2] ($1,000)	State Tax[1,2] $/ton	Federal Tax ($1,000)	Federal Tax $/ton
16.00	12.5	9,926	1.20	5,383	0.65
	20.0	9,213	1.12	2,687	0.33
17.00	12.5	10,712	1.30	7,553	0.92
	20.0	9,868	1.20	4,409	0.53
18.00	12.5	11,512	1.39	9,825	1.19
	20.0	10,567	1.28	6,254	0.76

[1] Includes property, severance and state income taxes.

[2] Numbers rounded to nearest thousands.

TABLE 7. - Total royalties paid over the life of the property varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	Total Royalties[2] ($1,000)	Royalties Dollars Per Ton
16.00	12.5	389,611	2.95
	20.0	623,374	4.72
17.00	12.5	413,962	3.13
	20.0	662,339	5.02
18.00	12.5	438,312	3.32
	20.0	701,300	5.31

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] All royalties are rounded to the nearest thousand.

TABLE 8. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[2,3] ($1,000)
16.00	12.5	29.6	59,386
	20.0	20.1	11,585
17.00	12.5	36.5	90,415
	20.0	26.3	43,373
18.00	12.5	43.2	119,055
	20.0	32.4	72,375

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] Discount rate equals 18 pct.

[3] All N.P.V. figures are rounded to nearest thousand.

TABLE 9. - DCFROR and N.P.V. at varying coal selling prices and royalty rates using a 5 pct rate of inflation for all costs and prices and only Federal Income Tax included

Coal Selling Price[1] ($/ton)	Royalty Rate (Pct of Gross)	DCFROR (Pct)	N.P.V.[2,3] ($1,000)
16.00	12.5	34.3	81,577
	20.0	24.1	33,052
17.00	12.5	41.9	113,894
	20.0	30.9	65,895
18.00	12.5	49.2	144,538
	20.0	37.9	96,951

[1] Given a 5 pct inflation rate, the average coal selling price for the life of the property at $16.00, $17.00 and $18.00 were $23.60, $25.10 and $26.60, respectively.

[2] Discount rate equals 18 pct.

[3] All N.P.V. figures are rounded to the nearest thousand.

TABLE 10. - Summary results of the analysis upon the economics of the coal properties on the Kayenta Lease Area assuming $100,000,000 remaining capital from prior years; analyses performed in constant January 1984 dollars and at a 5 pct inflation rate (costs and prices); using a coal selling price of $17.00 per ton and two royalty rates of 12.5 and 20.0 pct of gross revenues, and all taxes included

Item	$100,000,000 Prior Capital, Constant January 1984 Dollars	$100,000,000 Prior Capital, with a 5 pct Inflation Factors
1. Total tons of coal produced over the life of the property	132,054,000[1]	132,054,000[1]
2. Total capital invested over the life of the property	$410,026,000[1 2]	$523,118,000[1 2]
3. Amount of capital per ton of coal produced	$3.11[3]	$3.96[3]
4. Cumulative operating cost over the life	$890,044,000[1 4]	$1,312,988,000[1 4]
5. Operating cost per ton of coal produced	$6.74	$9.94[5]
6. Total revenues generated over the life of the property	$2,244,911,000[1]	$3,311,693,000[1]
7. Average selling price received per ton of coal produced	$17.00	$25.08[5]
8. Total royalties paid over the life of the properties at a rate of:		
12.5 pct	$280,614,000[1]	$413,962,000[1]
20.0 pct	$448,982,000[1]	$662,337,000[1]
9. Amount of royalty received per ton of coal produced at a rate of:		
12.5 pct	$2.12	$3.13[5]
20.0 pct	$3.40	$5.02[5]
10. DCFROR to the company at a:		
12.5 pct royalty	32.0%	36.5%
20.0 pct royalty	21.5%	26.3%
11. N.P.V. at an 18 pct discount rate at a:		
12.5 pct royalty	$55,538,000[1]	$90,415,000[1]
20.0 pct royalty	$14,899,000[1]	$43,373,000[1]

[1]Rounded to nearest thousands.
[2]Includes all plant, equipment and development costs, reinvestments and working capital.
[3]Item 2 divided by item 1.
[4]Includes mine operating cost, reclamation costs and black lung fees.
[5]An average figure for the life of the property.

*** CONCLUSIONS

The purpose of the study had a two-fold nature. First, to develop capital and operating costs that would realistically depict the actual costs involved at the Kayenta Mine. Secondly, to analyze the impact of changing coal prices, varying royalty rates and the inclusion of state taxes on the profitability of this project as measured by the DCFROR method. To develop reasonable capital and operating costs estimates, site specific information was obtained from several sources including the Kayenta Mine Plan submitted to the Office of Surface Mining. Also, operating procedures detailed in this mine plan were considered in the development of the operating cost estimate.

Several inferences concerning the impact of price, royalty rates and taxes have been brought out in this study. Under the price and royalty rate ranges investigated by this study, the DCFROR ranged from 14.5 pct to 39.0 pct when state taxes were applied and constant 1984 dollars were used. The lowest project return (DCFROR = 14.5 pct) occurred at a price and royalty rate of $16 per ton and 20 pct, respectively. Alternatively, the highest project return (DCFROR = 33.2 pct) occurred at a price of $18 per ton and a 10 pct royalty. Further insite on the relationships between the above-mentioned parameters and the project profitability may be gained through a more detailed examination of these tables.

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A REPORT ON THE ISSUE OF ROYALTY RATE ADJUSTMENT FOR LEASE NO. 14-20-0603-8580 (KAYENTA COAL MINE) NAVAJO RESERVATION

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I. Introduction and Background

The subject lease was entered into by the Navajo Tribe and the Sentry Royalty Company, a wholly-owned subsidiary of the Peabody Coal Company (Peabody), on February 1, 1964. The lease was approved by an authorized representative of the Secretary of the Interior on August 28, 1964. Sentry Royalty Company subsequently assigned its interests in the subject lease to its parent corporation, the Peabody Coal Company.

The Navajo Area Director, on June 18, 1984, pursuant to his delegated authority to make a "reasonable adjustment" in the royalty terms, adjusted the royalty rate to twenty (20) percent of the gross value of the coal mined under the subject lease. Based on current sales price of 17 dollars per ton, this adjustment would escalate the tribal royalty receipts for coal mined under the subject lease from approximately 30[cents] per ton to 3.40 dollars per ton.

Peabody disputed the adjustment, and filed an appeal with the Deputy Assistant Secretary - Indian Affairs (Operations). After a brief review of the appeal, in a letter dated March 4, 1985, the Deputy Assistant Secretary requested Peabody to submit its actual cost, revenue, and investment figures for this lease, including the overriding royalties, if any, paid to assignor Sentry Royalty Company or its successors.

In a letter dated March 29, 1985, Peabody declined to provide the data requested. Peabody believes that the request is not pertinent or necessary to support its arguments that its profitability is a

wholly irrelevant factor in seeking to determine a reasonable royalty rate under the adjustment provision contained in the lease.

The subject lease, encompassing 24, 853 acres of tribal land, is for a term of 10 years and for so long thereafter as the substances produced are being mined by the lessee in accordance with its terms in paying quantities, for the purpose and with exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas.

The key aspect of the lease with respect to the royalty rate adjustment is provided in Section VI of the lease. This section provides in part that "during the period that the land so leased is under federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter." (Underlined for emphasis)

Prior to the adjustment by the Area Director, the royalty rate for coal mined under the lease ranged between twenty (20) cents per ton to thirty-seven and one-half (37½) cents per ton. The actual amount of royalty that the Tribe received depended on the sales price of the coal mined and whether the coal mined was utilized on or off the reservation. At a 17 dollar per ton sales price (current), the royalty rate to the Tribe would range between 1.76 percent to 2.21 percent of the gross value of the coal mined under the lease—1.76 percent if all the coal mined is used on the

reservation, 2.21 percent if all the coal mined is used off the reservation.

II. Summary of Royalty Rate Adjustments Proposed by Respective Parties for Coal Mined under the Subject Lease

Royalty rate recommended in various reports ranges from a low of 5.57 percent to a high of 24.44 percent, and are as follows:

1. The Peterson and Company in a report dated November 28, 1984, and prepared at the request of Peabody proposed a royalty rate between 5.57 percent to 7.16 percent of gross realization of coal sold under the lease. The report concluded that such a rate will restore to both parties the benefits that were originally contemplated in 1964 when the lease was signed.

2. The Peabody Coal Company - Arizona Division in a report dated September 15, 1982 concluded that the royalty rate proposed by Peabody on December 28, 1981, is equitable. On that date, Peabody offered to raise the royalty rate to 12.5 percent on gross sales without deduction for coal under the lease currently under dispute, and also offered to raise the royalty on Lease No. 9910, which has no adjustment clause, from 6.67 percent to 12.5 percent. Lease No. 9910 encompasses land with mineral rights owned jointly by the Navajo and the Hopi Tribes. This offer was subsequently withdrawn. This report also questioned the validity of data used in the Schwab Report

which was prepared for the Navajo Tribe and is discussed below.

3. The F.R. Schwab & Associates, Inc. in a report dated April 12, 1982, and prepared for the Navajo Tribe recommended a royalty rate of 12 to 16 cents per million BTU; this value is equivalent to $2.64 to $3.52 per ton for all coal mined under the lease. Assuming the sales price of coal was $15.46/ton at the time the report was written, the royalty rate recommended in the report would range between 17.08 percent to 22.77 percent. This report is based on a comparative sales approach (analysis of market data), and (2) the income of earnings approach, also known as discounted cash flow analysis.

4. The Council of Energy Resources Tribes (CERT) in a report prepared for the Navajo Tribe stated that a royalty rate of between 15 percent and 20 percent would be "completely justifiable." The rate recommended is based on Peabody's tribal mining operations profitability analysis. In a subsequent report dated January 1985, CERT recommended a 20 percent royalty rate.

5. The United States Bureau of Mines in a report dated June 6, 1984, and prepared at the request of the Energy and Mineral Resources Division of the Bureau of Indian Affairs, made a number of projections based on the Discounted Cash Flow Rate of return (DCFROR) method. Under 5 different scenarios, the DCFROR for coal properties within the lease area ranged from a low of 16.27 percent to a high of 120+

percent. The report concluded that the coal properties within the lease area have a very high profit potential.

In a subsequent report dated May 6, 1985, after additional verification of data with respect to cost, investment, and sales, and at a 20 percent royalty rate, the United States Bureau of Mines projected a DCFROR of 21.5 percent using constant 1984 dollars and 26.3 percent using a 5 percent rate of inflation for all costs and prices. The selling price of coal used in these projections is $17 per ton.

6. The Mining Section of the Energy and Mineral Resources Division, Bureau of Indian Affairs in a memorandum dated June 6, 1984, computed a royalty rate of 24.44 percent. Peabody's DCFROR in this study ranged between a low of 26.4 percent at a 30 percent royalty rate to a high of 49.8 percent at a 12½ percent royalty rate for coal mined solely under the subject lease area.

III. Review and Analysis of Reports Relied on by the Area Director in his Decision to Adjust the Royalty Rate to 20 Percent

In adjusting the royalty rate to 20 percent of the gross value of the coal mined under the subject lease, the Area Director considered reports and recommendations from the BIA Navajo Area Office, and the BIA Energy and Mineral Resources Division, the U.S. Bureau of Mines, and others. Nearly all of these reports analyzed Peabody's profitability and/or its DCFROR which is based on a method that involves estimating future operating and investments costs, taxes, and other

expenses as well as future revenues. Because the actual financial data from Peabody was unavailable, even the current operating costs and investments were based on estimates.

Depending on the scenario chosen, the DCFROR in the Bureau of Mines Report ranged between a low of 16.27 percent to a high of 120+ percent. DCFROR for coal mined under the subject lease, and prepared by the Energy and Mineral Resources, BIA, ranged between 26.4 percent at a 30 percent royalty rate to 49.6 percent at 12½ percent royalty rate. The DCFROR in these reports has such a wide range and in some instances so high that it is difficult to make any meaningful and objective conclusion with respect to Peabody's DCFROR under the subject lease. In addition, as pointed out in Peabody's latest submission, Peabody's cost of operation in the BIA Energy and Mineral Resources Mining Section's Report is grossly understated when compared with the cost that is used by the consortium of utilities in computing the price of coal. Peabody is paid by the utilities for the coal mined under the lease based on its cost of operation. As reported by the consortium, Peabody's cost of operation for 1984 was $12.33 per ton. The operating cost in the BIA Energy and Mineral Resources Division Report ranged between $4.72 per ton to $6.18 per ton.

Therefore, although all projections involving Peabody's DCFROR and profitability analysis indicate that the coal properties within the lease area have a very high profit potential, the specific DCFROR projections can not be relied upon. It becomes obvious when one examines the specific data with respect to cost, revenue, and investment that have been used to make the DCFROR projections in various reports. For example, the operating cost among various reports relied upon by the Area Director are substantially different. Since operating cost is a key component of any DCFROR projection, it would in turn significantly affect the DCFROR projections in these reports.

Despite the fact that the DCFROR projections and the profitability analysis that were relied on by the Area Director in adjusting the royalty rate are at best approximate, certain conclusions with respect to the coal properties within the lease area are obvious. The most significant being that the coal deposits within the lease area from a geological, engineering, and economic standpoint are extremely valuable. Specifically, the thickness of the coal seams, the thickness of the overburden, the overburden and recovery ratios, the quantity and quality of the reserves, the size of production, its marketability, etc., are extremely favorable and indicate that the coal properties within lease area would have a very high profit potential.

In order to analyze Peabody's profitability and DCFROR based on its actual cost, revenues and investment, the Deputy Assistant Secretary - Indian Affairs requested Peabody to furnish such data. Peabody refused to provide such data because, in its opinion, an analysis of the proposed royalty adjustment based on its return on investment is not a relevant inquiry for determining the reasonableness of the proposed royalty adjustment.

In view of Peabody's refusal to provide such data, this office reconsidered and reevaluated the reasonableness of the royalty adjustments made by the Navajo Area Director based on data currently available.

IV. Reconsideration of the Issue Involving Royalty Rate Adjustment by the Area Director

During the course of this reconsideration, we first reviewed various valuation methodologies to determine the most appropriate method to value the remaining coal reserve for purposes of royalty rate adjustment. There are two basic approaches that can be used to determine the value of the coal properties for establishing a royalty rate. They are: (1) The comparable sales approach, and (2) The income and earnings approach.

The comparable sales approach is based on market value (price) and reflects the sales price of comparable investments on the open market. Under this approach, all current transactions in the market area and the corresponding royalty rates for comparable coal properties are analyzed to determine the going royalty rate. Since this rate is highly sensitive and susceptible to changes in the market with respect to supply and demand, under most circumstances, this is considered the most appropriate method for purposes of valuation. However, in order to establish a royalty rate based on this approach, several requirements must be met. First, the coal reserves being compared must be truly comparable and differences, if any, must be adjusted. Specifically, the comparability with respect to the size of the reserve, the physical and chemical characteristics of the coal, the annual production (anticipated or actual), cost of production, mining techniques (surface vs. underground), the overburden ratio, etc., must be established. Secondly, the number of current, comparable transactions (coal mines) must be large, i.e., the data base should be large and representative.

The comparable sales approach was considered not appropriate in determining the reasonableness of the

royalty rate for coal under the subject lease for the following reasons. Coal leasing in the Rocky Mountain Region, where the coal deposits under the subject lease are located, is dominated and influenced by the Federal coal leasing activities. Under the Federal coal leasing program, royalties are fixed and based solely on the method of extraction. The Federal royalty rate for surface-mined coal is 12.5 percent of the gross value of coal and 8 percent for underground-mined coal. Thus, if a Federal tract containing an unusually large and valuable deposit is offered for lease, the value of that deposit will be reflected *not* by an increase in the royalty rate, but by an increase in the amount of bonus to the lessor (Federal government). Therefore, a comparable royalty rate for coal under the subject lease based on current transactions involving Federal coal lands is inappropriate. Other current comparable transactions in the market area of consideration are limited in number and do not meet the comparability requirements. Therefore, a royalty rate determination based on comparable analysis will be highly questionable. Because of these reasons, Schwab and Associates royalty rate determination based on comparable sales approach is also questionable and cannot be solely relied upon.

In the absence of data to determine the value of an investment, (in this case the royalty rate to the Tribe) by the comparable sales approach, the income and earnings approach will be considered an acceptable method in valuing a mineral deposit.

Because of the reasons given below, the royalty rate adjustment under this method is based on the analysis of Peabody's after tax rate of return on investment. The agreement between the Tribe and Peabody is a

lease where both parties have made significant capital investments—the Tribe in the form of a nonrenewable mineral asset and Peabody in the form of money, men, and equipment. Both are "at risk" with respect to their investment and continue to look toward income from extraction of the mineral for the return of capital *throughout the life of the lease.* The value of the lessor's (Tribe) minerals asset, and its share of the income from extraction is reflected in the royalty rate. If the mineral deposit (asset) is marginal, the royalty rate would be low. However, if the deposit is valuable and unique, the royalty rate would be high. The determination as to whether a deposit is valuable or marginal, in the absence of comparable sales data, can only be accomplished by analyzing the lessee's (Peabody) after tax rate of return and/or its profitability. The after tax rate of return of a lessee, to a large extent, reflects the characteristics of the mineral deposit in terms of its quantity, quality, mineability, marketability, etc. Therefore, Peabody's after tax rate of return and/or its profitability is significant for purposes of royalty rate adjustment. Under this premise, if the after tax rate of return for Peabody is consistently very high, the Area Director would be entitled to adjust the royalty rate upward (to provide an equitable return on investment) under the adjustment provision provided in the lease.

In the absence of actual financial data from Peabody, we requested the U.S. Bureau of Mines to make a DCFROR projection and determine the Net Present Value (NPV) using cost, investment and revenue figures that could be typical for an operation like the Peabody Kayenta mine (subject lease area). The cost, investment, and revenue projections are based on publications that are typically used in making these

projections, including mine plan data submitted by Peabody to the Office of Surface Mining. At a 20 percent royalty rate, and $17 per ton sales price for coal mined under the subject lease, the DCFROR in the Bureau of Mines Report dated May 6, 1985, is 21.5 percent using constant 1984 dollars and 26.3 percent using a 5 percent rate of inflation for all cost and prices. NPV using an 18 percent discount rate is positive under both the circumstances described above. The sales price used in this report is also in line with the figures provided by the Salt River Project participants (utilities that buy the coal mined under the subject lease). When Peabody's projected after tax rate of return from its operation under the subject lease is compared with published information regarding return on equity for other coal mining companies certain conclusions are inescapable. Peabody's projected after tax rate of return *over the life of the mine* from its operation under the subject lease (21.5 percent in constant 1984 dollars and 26.3 percent using a 5 percent inflation rate for cost and prices) will be considered an exceptionally good return on investment. Although information with respect to DCFROR for other major coal companies is not readily available, we believe that Peabody's projected after tax rate of return is substantially higher then the rate of return for other major coal mining operations. The Internal Revenue Service and the Standard and Poor, however, publish data regarding income and rate of return on equity for coal mining companies. The rate of return for coal mining companies generally ranges between 10-14 percent. In addition, we believe that if certain items in the Bureau of Mines projection were treated differently, the resulting DCFROR could have been even higher. For example, Peabody, the mining entity, almost certainly

pays an unknown amount of money in the form of overriding royalty to its own wholly-owned subsidiary, the Sentry Royalty Company. This is done to a large extent to qualify a part of the future income from mining as capital gains income under section 631(c) of the Internal Revenue Code. This is accomplished by having a company (in this case Sentry Royalty Company) other than the one that will do the actual mining of the coal, acquire the reserve and then sublease to a related mining company (in this case Peabody) with a retained overriding royalty. The parent company thus receives the benefits of both the percentage and cost depletion and manages to convert a portion of the income, which otherwise would have been ordinary, into capital gains income. As a consequence, the *effective* tax rate on net income from mining under the subject lease is in reality considerably lower than those used in the Bureau of Mines projections. Similarly, if certain items of tax preference such as development expenditures were expensed rather than capitalized, the DCFROR could have again been higher.

The latest projection by the Bureau of Mines, however, clearly indicates that coal deposits under lease to Peabody are exceptionally valuable. Furthermore, even with a royalty rate of 20 percent of the gross value of the coal mined under the subject lease, Peabody's after tax rate of return would continue to be significantly higher than the overall coal industry rate of return.

Furthermore, as pointed out in the Peabody's latest submission, its DCFROR and/or profitability will not be affected by any increases in the royalty rate for coal mined under the subject lease. Peabody, under the fuel supply agreement with the utilities, will be allowed to

pass on all royalty rate increase to the utilities. In other words, despite a royalty rate increase, Peabody is assured that it will continue to receive a mutually agreed upon after tax rate of return for its operation under the subject lease. That return for the period 1974-1983 (the latest period for which the data is available), was 15 percent after taxes on a discounted cash flow basis.

The fuel supply agreement between the utilities and Peabody is for an initial term of 35 years following the date of firm operation of unit 3 (April 30, 1976). At the option of the utilities, the initial term can be extended further for a period not exceeding 15 years.

It appears that under the agreement, Peabody is not only entitled to pass on any increases in the royalty rate to the utilities but has assured itself of a consistently high rate of return (after taxes). Although the actual financial data from Peabody is unavailable, based on the known industry practices, it appears highly likely that Peabody also passes on as cost the overriding royalties it pays its wholly owned subsidiary—the Sentry Royalty Company. If that amount were added to the rate of return that Peabody has been assured from its mining operation under the subject lease, we believe that the actual *effective* rate of return on its investment would be even higher.

V. Conclusion

Based on a review and analysis of all the information currently available, a royalty rate adjustment to 20 percent of the gross value of the coal mined from the subject lease appears justifiable and defensible.

VI. Recommendation

We recommend that the Area Director's decision to adjust the royalty rate to 20 percent of the gross value of the coal mined from the subject lease be sustained.

[Seal Omitted]

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20245

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Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

Dear Sirs:

This letter is our decision in the above-referenced appeal. Peabody Coal Company, lessee of Lease No. 14-20-0603-8580, and two groups of purchasers of coal, the Navajo Project Participants and the Mohave Project Participants (hereinafter "appellants"), challenge a June 18, 1984 decision of the Navajo Area Director.

The decision informed Peabody that the Area Director was adjusting the royalty rate to "20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f."

The Navajo Tribe and Sentry Royalty Company entered into lease No. 14-20-0603-8580 on February 1, 1964. The Assistant Area Director approved it on August 28, 1964. In 1968 the lease was assigned to Peabody. The lease provides for a variable royalty rate tied to the gross realization from the sale of the coal and whether the coal mined from the lease is used on or off the Reservation. Article IV.

Article VI "Termination of Federal Jurisdiction" states:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

It was pursuant to this provision that the Area Director issued his decision.

Two issues have been raised by appellants in this appeal. First, did the Area Director adjust the royalty at the time provided for in Article VI; and second, whether the adjustment was reasonable.

I.

Appellants contend that the Area director acted too late to adjust the royalty. They argue that any adjustment must occur before 20 years following the effective

date and that the effective date is February 1, 1964. Thus, the Area Director acted too late when he adjusted the royalty on June 18, 1984. The Tribe maintain that the effective date is August 28, 1964 . . . when the lease was approved. Moreover, it argues that even if the effective date was February 1, 1964, the adjustment was timely when it occurred. For the following reasons we conclude the adjustment was made timely.

First, we find that the effective date of this lease is August 28, 1964 when the Secretary's representative approved the lease. The lease was entered into pursuant to the authority contained in 25 U.S.C. § 396a. It authorizes mineral leases on tribal land with the approval of the Secretary of the Interior for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. The regulations to which this lease is subject state that the term shall run "from the date of approval by the Secretary of the Interior, or his authorized representative." 25 C.F.R. § 211.10. These requirements control over any language in the lease especially in light of Article X which requires conformance to the regulations. Consequently, notwithstanding the fact that the lease states it is effective February 1, 1964, the approval date is the effective date. The Bureau of Indian Affairs' ("BIA") understanding of the effective date at the time the lease was approved confirms the conclusion that August 28, 1964 is the effective date. Moreover the lessee did not challenge this conclusion when it was communicated to the lessee. See Exhibits 4-7 attached to the Navajo Tribe's Answer Brief.

Appellants' references to and reliance on the doctrine of relation back are not persuasive in this instance.

Appellants content that the law makes the approval on August 28 relate back to February 1. But, as a case Appellants cite makes clear, the doctrine of relation back is resorted to in order to accomplish equity and justice. Appellants Brief at 9. Thus, its purpose is to "prevent a just and equitable title from being interrupted by claims which have no foundation in equity." *Lykins v. McGrath*, 184 U.S. 169, 171 (1902). This principle is demonstrated in the facts of all the cases Appellants cite for their argument for relation back. In every case, there was a third party asserting rights based on a new deed or new lease which, if the first transaction was not upheld as valid, would interfere with the original parties' rights.

That situation, where equity does demand that the doctrine of relation back apply, is not present in our current appeal. Peabody is not defending its leasehold interest against a third party who claims an interest originating from a document entered into between February 1 and August 28, 1964. Thus, there is no need for the doctrine of relation back to be applied to preserve Peabody's interest, and a finding that the approval date is the effective date will not dislodge Peabody's leasehold interest.

Our second reason for finding the adjustment was timely made is that even if we were to agree with Appellants that the effective date is February 1, we still would find the adjustment was timely. Unless otherwise contradicted, terms in leases . . . should be interpreted in a reasonable manner. There is nothing in this lease to indicate that the adjustment could occur only at a precise point in time. Reasonableness would dictate only that notice of the adjustment should be

given at a time close to the end of the first twenty years of the lease.

The only authority cited by Appellants to challenge this conclusion is not persuasive. *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982) did not involve Indian lands and was an interpretation of the Mineral Lands Leasing Act which is not applicable here. Furthermore, the company in that case reasonably believed that after almost 2½ years the government was not going to adjust the royalty because normal practice was to give notice of the adjustment either before or immediately after the 20 year anniversary date. Indeed, the regulations required prior notice whenever feasible. No such normal practice exists with Indian leases against which to compare the Area Director's action because adjustment clauses are rare. Moreover, only 4½ months had elapsed between the alleged 20 year anniversary date and the Area Director's notice of adjustment, and in any event Peabody was aware that an adjustment to the royalty was likely. An increase in the royalty rate had been discussed during negotiations between Peabody and the Tribe at least two years prior to the Area Director's decision. Consequently, we find little merit in appellants' argument that the adjustment was untimely even if we consider, *arguendo*, that February 1, 1964 is the effective date.

For the above reasons I conclude that the Area Director's decision was timely made. This decision is based on the interpretation of law and shall become final 60 days from receipt of this letter unless an appeal is filed with the Board of Indian Appeals pursuant to 43 C.F.R. § 4.310.

II.

Once we have concluded that the Area Director's adjustment was timely, we must address the second issue. Appellants content the Area Director's decision as to the royalty rate was arbitrary, capricious, and per se unreasonable. Their key point is that he used the wrong methodology to make his determination. Appellants argue that he and his supporting material considered the issue with the view that this was a renegotiation of the lease, not an adjustment of an existing lease, and as a result relied on the wrong standard in making his determination.

While it is true that some of the materials relied upon by the Area Director used the word "renegotiation" and were used to advise the Tribe on negotiation strategies, their underlying methodologies were two: comparable leases and discounted cash flow analysis. In contrast to these established methods, Appellants support an analysis which would preserve for the parties the benefit of the bargain struck by them in 1964. Appellants' Brief at 13.

We do not agree with Appellants. Article VI of the lease allows for an adjustment to the royalty provisions because the parties did not agree to have the same royalty throughout the lease. If they could have satisfactorily anticipated the future there would be no need for an adjustment clause. Thus, the terms of their lease make it clear that the only expectation they had in 1964 was that after 20 years the royalty could be reasonably adjusted by the Secretary based on current market conditions. The only rational basis for an adjustment clause is that the bargain struck in 1964 was to be changed after 20 years.

At the present time, the royalty rate for this lease is far lower than what we could find reasonable or acceptable. It is Departmental policy that the federal minimum rate of 12½% would be a minimum below which we could not set the rate. But our evidence indicates that this coal deposit is unusually valuable. Thus intuitively, we believe the royalty rate should be more than the minimum. How much more depends on how valuable the deposit is. There are two basic methods we can use to determine the relative value of the coal deposit and thus the lease. One is to compare the royalty rate from recent lease sales of comparable deposits of coal. However, little, if any, comparable data is available because this lease is very unusual. Most coal leasing in the Rocky Mountain Region occurs on federal tracts. The royalty rate for these leases is the pre-set 12½% and does not reflect the value of the mineral deposit to either the lessor or lessee. Other areas of the country where non-federal leasing occurs are not comparable in size, physical or chemical characteristics, anticipated production, removal techniques, overburden ratio, etc. Thus, I conclude we cannot use this method in this situation because comparable data is lacking.

The other method, and the one employed by many of the reports relied upon by the Area Director, is to compare the profitability of this lease to others through the evaluation of the after tax rate of return on investment. The basis for an accurate use of this method is accurate data on costs and expenses. The data used by the authors of the reports relied upon by the Area Director were estimates. For this reason we requested Peabody to submit its actual cost figures so that we could generate an accurate evaluation. Peabody declined. Letter of March 29, 1985. However, one of the

purchasers did provide some data. In addition, we independently estimated what the typical cost, investment, and revenue figure would be for an operation like Kayenta Mine.

Our analysis concluded that at a 20% royalty rate, and assuming a $17.00 per ton sales price, Peabody's after tax rate of return over the life of the mine would be 21.5% in constant 1984 dollars, and 26.3% considering 5% inflation for cost and prices. This compares to a range of 10-14% for mining companies generally. Thus, even with a 20% royalty rate, Peabody would be getting a significantly higher rate of return on investment than is normal for the coal industry. Moreover, given the current structure of the tax system, Peabody may likely be getting an even greater return due to its ability to convert some income into capital gains through the use of an overriding royalty payment to its subsidiary, and the former lessee, Sentry Royalty Company.

We are told that Peabody and the coal purchasers have entered into agreements whereby Peabody is guaranteed a minimum rate of return. Appellants therefore argue that evaluating a rate of return with respect to Peabody is meaningless. I disagree. The lease provides that the Secretary may make a reasonable adjustment to the royalty rate. As was shown above, other methods of determining a reasonable rate cannot be applied to this situation. The rate of return method provides us a method whereby we can determine if a certain royalty, in this case 20%, will yield a rate of return to Peabody which is comparable to guaranteed a return or not. Our analysis shows that not only is Peabody's projected return comparable to other companies, it is

projected to earn more than normal with the royalty at 20%.

For the above reasons I conclude that 20% is a reasonable royalty rate and affirm the Area Director's decision. My decision is based on the exercise of my discretionary authority and is final for the Department.

Sincerely,

Deputy Assistant Secretary
Indian Affairs

cc: Area Director, Window Rock
Field Solicitor, Window Rock
BIA Code 240

PEABODY HOLDING COMPANY INC.
1120 20TH STREET, N.W., SUITE S-720
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(202) 659-8101

CHRIS FARRAND
VICE PRESIDENT
GOVERNMENT RELATIONS

July 5, 1985
[Received July 12, 1985]

The Honorable Donald P. Hodel
Secretary of the Interior
18th and C Streets, N.W.
Room 6151
Washington, D.C. 20240

Dear Mr. Secretary:

It is our understanding that a Departmental decision may be imminent on the Appeal of Peabody Coal Company on the royalty rate adjustment on a coal lease (lease 14-20-0603-8580) issued by the Navajo Tribe to Peabody at Black Mesa, Arizona.

In June 1984, the Area Director of the Bureau of Indian Affairs unilaterally adjusted the royalty rate on the subject lease from 37.5 cents per ton to 20 percent of the value of the coal. This occurred in spite of the fact that Peabody and the Tribe were actively negotiating a comprehensive lease extension which included a royalty adjustment. Even in the face of the Area Director's decision and the immediate appeal by Peabody and its customers, the Tribe continued negotiating with Peabody toward a voluntary agreement providing for a royalty adjustment to 12.5 percent. As recently as May

1985, the Tribe indicated verbally that the Peabody offer would be acceptable provided some other considerations were agreed to.

Apparently, the Tribe has received word of an imminent and favorable decision on the appeal. Last week, we were informed by the Tribe that further negotiations would be suspended until the Department ruled on the appeal of the Area Director's decision.

It seems ill-advised and untimely to make a determination on the appeal of the royalty adjustment. We are confident that a voluntary agreement can be reached between Peabody and the Tribe. The Department, however, appears to be preempting these negotiations, as manifested by the Area Director's June 1984 decision and the seemingly imminent decision on the appeal. Assuming the Department denies the appeal, Peabody and its customers will be obligated to litigate the unilateral imposition of the inordinately high royalty rate. Hence, instead of a mutually-agreed upon contractual arrangement, there will be a one-sided solution followed by protracted litigation, during which the incremental royalties, representing millions of dollars annually, will presumably be held in escrow rather than flow directly to the Tribe.

As we have indicated in our appeal, the adjustment of the royalty to 20 percent puts the Navajo lease virtually in a class by itself. No other Indian leases or federal leases bear royalty rates as high. Not only would such a rate disadvantage Black Mesa coal and the users of electricity produced by that coal, but the Department would be setting a rigid precedent for future royalty adjustments for both Indian and federal leases.

We respectively urge you to (1) assume direct responsibility for this unusual royalty appeal case, and (2) either postpone a judgement to allow for a voluntary settlement or grant Peabody's appeal of the Area Director's decision. We believe it would be far better for the Department to facilitate an agreement between the Tribe and Peabody than to impose an inequitable arrangement and there by set an adverse precedent.

Sincerely,

/s/ CHRIS FARRAND

CF/mm

cc: Mr. John Fritz
Deputy Assistant Secretary of Indian Affairs

Mr. Timothy Vollmann
U.S. Department of the Interior

Mr. Paul Frye
Navajo Nation Department of Justice

Mr. Robert Briedenbecker
Southern California Edison

Mr. Leroy Michael
Salt River Project

Mr. R.H. Quenon
Peabody Holding Company, Inc.

Mr. W.T. Ewing
Peabody Coal Company

Mr. K.R. Moore
Peabody Coal Company

COMPANY MEMORANDUM

TO: F.L. Barkofske – CONFIDENTIAL

DATE: July 22, 1985

FROM: E.L. Sullivan

RE: Navajo Lease Royalty Rate Adjustment

Ken Moore, President of Arizona Division, contacted me by telephone on July 11, 1985, and requested that I arrange a dinner meeting for Greg Leisse and a Mr. Stan Hulett. The president of Southern California Edison Company (So. Cal.) had recommended Mr. Hulett to Ken Moore. Mr. Hulett was a former upper level Department of Interior employee whom So. Cal. believed may have some influence with the current Secretary of Interior (Don Hodel). The dinner meeting was arranged to consider the prospect of Mr. Hulett discussing the Navajo Lease royalty rate adjustment with Secretary Hodel. Chris Farrand was informed of this matter and suggested that if it appeared that Mr. Hulett possessed the type of influence which would be required that we should make use of his services.

After our meeting with Mr. Hulett, Greg Leisse and I discussed the pros and cons of having Mr. Hulett act on Peabody's behalf. This included, among others, consideration of the following: (1) whether this activity would be considered an "*ex parte*" contact as part of Peabody's appeal of the Navajo Area Director's decision; (2) whether Mr. Hulett possessed the requisite influence; (3) the fact that So. Cal. recommended that Peabody make use of Mr. Hulett's services in the matter of the royalty rate adjustment; (4) the cost of Mr. Hulett's services; and (5) the interplay of a contact

by Mr. Hulett on Peabody's behalf with the recently sent letter from Chris Farrand.

After weighing all factors, Greg and I agreed that we should allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz (Deputy Assistant Secretary, Bureau of Indian Affairs) and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the issue without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo—drafted in large part by Greg and myself—addressed to Mr. Fritz instructing him to (1) not make an untimely decision on the appealled case itself, and (2) encourage the parties to negotiate their differences.

I have been informed that that memo was delivered to Mr. Fritz's office on Monday, July 22, 1985.

Compensation for Mr. Hulett's services, according to Ken Moore, will be paid by the Arizona Division and will be passed on to our customer when coal shipments resume. The fee will be paid as a retainer, and spread over the remainder of the year (July-December) and will be in the range of $1,500-$2,000 per month. This arrangement will avoid the budgetary effects of a lump sum payment and will also allow Peabody to avail itself of Mr. Hulett's services again this year if such is deemed desirable. With Ken Moore's approval, Greg Leisse and I have been authorized to negotiate a firm monthly fee for Mr. Hulett within the range set out above.

I am available to provide additional information.

ES/mm[E.L.S.]

DRAFT
July 15, 1985

TO: John W. Fritz

FROM: Don Hodel

RE: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603-8580

I have reviewed the attached letter from Mr. C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late 1979 (several years before it was necessary to consider readjustment) and that the royalty rate which

the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal, therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

as sent forward for signature

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Paul Frye
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515

Re: Appeal of Navajo Area Director's Adjustment of Royalty, Lease No. 14-20-0603- 8580

Dear Sirs:

This letter is our decision in the above-referenced appeal. Peabody Coal Company, lessee of Lease No. 14-20-0603-8580, and two groups of purchasers of coal, the Navajo Project Participants and the Mohave Project Participants (hereinafter "appellants"), challenge a June 18, 1984 decision of the Navajo Area Director. The decision informed Peabody that the Area Director was adjusting the royalty rate to "20.0 percent of the gross value of the coal mined as determined by the Federal Formula under 45 CFR 3473.3-2(2) and 3485.2f."

The Navajo Tribe and Sentry Royalty Company entered into lease No. 14-20-0603-8580 on February 1, 1964. The Assistant Area Director approved it on August 28, 1964. In 1968 the lease was assigned to Peabody. The lease provides for a variable royalty rate tied to the gross realization from the sale of the coal and whether the coal mined from the lease is used on or off the Reservation. Article IV.

Article VI "Termination of Federal Jurisdiction" states:

> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter.

It was pursuant to this provision that the Area Director issued his decision.

Two issues have been raised by appellants in this appeal. First, did the Area Director adjust the royalty at the time provided for in Article VI; and second, whether the adjustment was reasonable.

I.

Appellants contend that the Area director acted too late to adjust the royalty. They argue that any adjustment must occur before 20 years following the effective date and that the effective date is February 1, 1964. Thus, the Area Director acted too late when he adjusted the royalty on June 18, 1984. The Tribe maintains that the effective date is August 28, 1964 when the lease was approved. Moreover, it argues that even if the effective date was February 1, 1964, the adjustment was timely when it occurred. For the

following reasons we conclude the adjustment was made timely.

First, we find that the effective date of this lease is August 28, 1964 when the Secretary's representative approved the lease. The lease was entered into pursuant to the authority contained in 25 U.S.C. § 396a. It authorizes mineral leases on tribal land with the approval of the Secretary of the Interior for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. The regulations to which this lease is subject state that the term shall run "from the date of approval by the Secretary of the Interior, or his authorized representative." 25 C.F.R. § 211.10. These requirements control over any language in the lease especially in light of Article X which requires conformance to the regulations. Consequently, notwithstanding the fact that the lease states it is effective February 1, 1964, the approval date is the effective date. The Bureau of Indian Affairs' ("BIA") understanding of the effective date at the time the lease was approved confirms the conclusion that August 28, 1964 is the effective date. Moreover the lessee did not challenge this conclusion when it was communicated to the lessee. See Exhibits 4-7 attached to the Navajo Tribe's Answer Brief.

Appellants' references to and reliance on the doctrine of relation back are not persuasive in this instance. Appellants contend that the law makes the approval on August 28 relate back to February 1. But, as a case Appellants cite makes clear, the doctrine of relation back is resorted to in order to accomplish equity and justice. Appellants Brief at 9. Thus, its purpose is to "prevent a just and equitable title from being interrupted by claims which have no foundation in equity."

Lykins v. McGrath, 184 U.S. 169, 171 (1902). This principle is demonstrated in the facts of all the cases Appellants cite for their argument for relation back. In every case, there was a third party asserting rights based on a new deed or new lease which, if the first transaction was not upheld as valid, would interfere with the original parties' rights.

That situation, where equity does demand that the doctrine of relation back apply, is not present in our current appeal. Peabody is not defending its leasehold interest against a third party who claims an interest originating from a document entered into between February 1 and August 28, 1964. Thus, there is no need for the doctrine of relation back to be applied to preserve Peabody's interest, and a finding that the approval date is the effective date will not dislodge Peabody's leasehold interest.

Our second reason for finding the adjustment was timely made is that even if we were to agree with Appellants that the effective date is February 1, we still would find the adjustment was timely. Unless otherwise contradicted, terms in the lease should be interpreted in a reasonable manner.

There is nothing in this lease to indicate that the adjustment could occur only at a precise point in time. Reasonableness would dictate only that notice of the adjustment should be given at a time close to the end of the first twenty years of the lease.

The only authority cited by Appellants to challenge this conclusion is not persuasive. *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982) did not involve Indian lands and was an interpretation of the Mineral Lands Leasing Act which is not applicable

here. Furthermore, the company in that case reasonably believed that after almost 2½ years the government was not going to adjust the royalty because normal practice was to give notice of the adjustment either before or immediately after the 20 year anniversary date. Indeed, the regulations required prior notice whenever feasible. No such normal practice exists with Indian leases against which to compare the Area Director's action because adjustment clauses are rare. Moreover, only 4½ months had elapsed between the alleged 20 year anniversary date and the Area Director's notice of adjustment, and in any event Peabody was aware that an adjustment to the royalty was likely. An increase in the royalty rate had been discussed during negotiations between Peabody and the Tribe at least two years prior to the Area Director's decision. Consequently, we find little merit in appellants' argument that the adjustment was untimely even if we consider, *arguendo*, that February 1, 1964 is the effective date.

For the above reasons I conclude that the Area Director's decision was timely made. This decision is based on the interpretation of law and shall become final 60 days from receipt of this letter unless an appeal is filed with the Board of Indian Appeals pursuant to 43 C.F.R. § 4.310.

II.

Once we have concluded that the Area Director's adjustment was timely, we must address the second issue. Appellants content the Area Director's decision as to the royalty rate was arbitrary, capricious, and per se unreasonable. Their key point is that he used the wrong methodology to make his determination. Appel-

lants argue that he and his supporting material considered the issue with the view that this was a renegotiation of the lease, not an adjustment of an existing lease, and as a result relied on the wrong standard in making his determination.

While it is true that some of the materials relied upon by the Area Director used the word "renegotiation" and were used to advise the Tribe on negotiation strategies, their underlying methodologies were two: comparable leases and discounted cash flow analysis. In contrast to these established methods, Appellants support an analysis which would preserve for the parties the benefit of the bargain struck by them in 1964. Appellants' Brief at 18.

We do not agree with Appellants. Article VI of the lease allows for an adjustment to the royalty provisions because the parties did not agree to have the same royalty throughout the lease. If they could have satisfactorily anticipated the future there would be no need for an adjustment clause. Thus, the terms of their lease make it clear that the only expectation they had in 1964 was that after 20 years the royalty could be reasonably adjusted by the Secretary based on current market conditions. The only rational basis for an adjustment clause is that the bargain struck in 1964 was to be changed after 20 years.

At the present time, the royalty rate for this lease is far lower than what we could find reasonable or acceptable. It is Departmental policy that the federal minimum rate of 12½% would be a minimum below which we could not set the rate. But our evidence indicates that this coal deposit is unusually valuable. Thus intuitively, we believe the royalty rate should be more than the minimum. How much more depends on how valuable the

deposit is. There are two basic methods we can use to determine the relative value of the coal deposit and thus the lease. One is to compare the royalty rate from recent lease sales of comparable deposits of coal. However, little, if any, comparable data is available because this lease is very unusual. Most coal leasing in the Rocky Mountain Region occurs on federal tracts. The royalty rate for these leases is the pre-set 12½% and does not reflect the value of the mineral deposit to either the lessor or lessee. Other areas of the country where non-federal leasing occurs are not comparable in size, physical or chemical characteristics, anticipated production, removal techniques, overburden ratio, etc. Thus, I conclude we cannot use this method in this situation because comparable data is lacking.

The other method, and the one employed by many of the reports relied upon by the Area Director, is to compare the profitability of this lease to others through the evaluation of the after tax rate of return on investment. The basis for an accurate use of this method is accurate data on costs and expenses. The data used by the authors of the reports relied upon by the Area Director were estimates. For this reason we requested Peabody to submit its actual cost figures so that we could generate an accurate evaluation. Peabody declined. Letter of March 29, 1985. However, one of the purchasers did provide some data. In addition, we independently estimated what the typical cost, investment, and revenue figures would be for an operation like Kayenta Mine.

Our analysis concluded that at a 20% royalty rate, and assuming a $17.00 per ton sales price, Peabody's after tax rate of return over the life of the mine would be 21.5% in constant 1984 dollars, and 26.3% considering

5% inflation for cost and prices. This compares to a range of 10-14% for mining companies generally. Thus, even with a 20% royalty rate, Peabody would be getting a significantly higher rate of return on investment than is normal for the coal industry. Moreover, given the current structure of the tax system, Peabody may likely be getting an even greater return due to its ability to convert some income into capital gains through the use of an overriding royalty payment to its subsidiary, and the former lessee, Sentry Royalty Company.

We are told that Peabody and the coal purchasers have entered into agreements whereby Peabody is guaranteed a minimum rate of return. Appellants therefore argue that evaluating a rate of return with respect to Peabody is meaningless. I disagree. The lease provides that the Secretary may make a reasonable adjustment to the royalty rate. As was shown above, other methods of determining a reasonable rate cannot be applied to this situation. The rate of return method provides us a method whereby we can determine if a certain royalty, in this case 20%, will yield a rate of return to Peabody which is comparable to other mineral operations, disregarding whether Peabody is guaranteed a return or not. Our analysis shows that not only is Peabody's projected return comparable to other companies, it is projected to earn more than normal with the royalty at 20%.

For the above reasons I conclude that 20% is a reasonable royalty rate and affirm the Area Director's decision. My decision is based on the exercise of my discretionary authority and is final for the Department.

On July 5 Peabody requested that the Secretary assume direct responsibility of this appeal and either

postpone a decision or issue one in its favor. Peabody contended that delaying the decision would encourage a voluntary settlement of new lease terms. The Navajo Nation responded on July 11 that no negotiations were pending and urged the Department to issue a decision upholding the Area Director. We do not believe any delay in our consideration of the appeal is warranted without the support of both parties. Consequently, I am now issuing this decision affirming the Area Director.

Sincerely,

Deputy Assistant Secretary
Indian Affairs

cc: Area Director, Window Rock
Field Solicitor, Window Rock
BIA Code 240

[Seal Omitted]

United States Department of the Interior
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

CONFIDENTIAL

[July 15 1985]

In reply please refer to:
Main Interior, Room 6456

BIA.WR.0260

MEMORANDUM

To: Deputy Assistant Secretary-Indian Affairs

From: Assistant Solicitor, Land and Minerals Branch
Division of Indian Affairs

Subject: Adjustment of Royalty Rate for Navajo Coal Lease held by Peabody

Peabody Coal Company has appealed a decision of the Navajo Area Director adjusting the royalty rate in Lease No. 14-20-0603-8580. Attached is a copy of a decision drafted for your signature which is currently proceeding through the surname process.

The lease was entered into in 1964. It has a specific provision subjecting the royalty provisions of the lease "to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years." In June 1984 the Area Director adjusted the royalty to 20% of the gross value of the mined coal. The original royalty had been set at a variable rate of between 25 and 37½ cents per ton of coal sold. Peabody challenges both the reasonableness

of the adjustment and the timing, claiming the Area Director's decision occurred too late.

Peabody and the Navajo Nation had been negotiating over the preceeding three years in an attempt to reach mutually satisfactory terms for a new lease. The negotiations were not successful. Because of the time frame for adjustment outlined in the lease, the Area Director felt he could not postpone the decision indefinitely. Last fall, purchasers of coal from Peabody requested Secretary Clark to stay this appeal so negotiations could continue. At that time you indicated that unless all parties supported a stay consideration of the appeal would continue. The Navajo Nation indicated it was not supportive of a stay and consideration has continued. In addition, requested meetings between Peabody, the Solicitor, and yourself were not scheduled because of the problem of *ex parte* communication.

The decision, as drafted, upholds the reasonableness of an adjustment of the royalty rate to 20%. An analysis of estimated costs and expenses reveals that with a 20% royalty rate Peabody could still be expected to earn a rate of return that was better than average for coal companies. Consequently, it could be considered reasonable.

/s/ THORNTON W. FIELD

[Seal omitted]

THE SECRETARY OF THE INTERIOR

WASHINGTON

July 17, 1985

MEMORANDUM FOR: JOHN FRITZ

FROM: DONALD PAUL HODEL/s/

SUBJECT: APPEAL OF NAVAJO AREA DIRECTOR'S ADJUSTMENT OF ROYALTY LEASE NO. 14-20-0603-8580

I have reviewed the enclosed letter from C.G. Farrand of Peabody Holding Company, Inc. While I do not necessarily agree with all of its points, there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate under the above lease by the parties to that agreement. Any royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals. The ultimate outcome could well impair the future of the contractual relationship established by the parties under the current lease.

Therefore, I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion.

As I understand the facts surrounding this appeal, in June 1984 the BIA Area Director adjusted the royalty rate on Lease No. 14-20-0603-8580 from 37.5 cents per ton to 20 percent of the value of coal. This occurred at a

time when the coal company and the Navajo Tribe were actively engaged in negotiations involving both a lease extension and a royalty rate adjustment. In fact, I understand that these negotiations had begun as early as late-1979 (several years before it was necessary to consider readjustment) and that the royalty rate which the lessee was offering was in the vicinity of the 12.5 percent which is currently required on surface coal mining leases on Federal land. The lessee (Peabody Coal) appealed the Area Director's decision.

From the filing of that appeal until the present time, the Navajo Tribe and Peabody have been meeting in an attempt to negotiate their way out of a somewhat complex legal dilemma.

I find it preferable to allow parties, with conflicting interests in the same matter, to have a sufficient amount of time to sit down and work out their differences. I believe this can be accomplished with respect to the issues currently subject to this appeal; therefore, a decision on the appeal at this time would be ill-timed.

I wish to assure you, however, that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal. If it becomes inevitable that such a determination must be made by the Department, then we can discuss it at that time.

THE NAVAJO NATION
WINDOW ROCK, NAVAJO NATION [ARIZONA] 86515

[Seal Omitted]

PETERSON ZAH
CHAIRMAN, NAVAJO TRIBAL COUNCIL

EDWARD T. BEGAY
VICE CHAIRMAN, NAVAJO TRIBAL COUNCIL

[Seal Omitted]

The Honorable Donald P. Hodel
Secretary of the Interior
18th and C. Streets, N.W.
Room 6151
Washington, D.C. 20240

RE: Navajo Lease
No. 14-20-0603-8580

Dear Mr. Secretary:

On July 5, 1985, Chris Farrand, Vice President, Peabody Holding Company, wrote to you asking you to intervene in their appeal before the Department of Interior and to postpone the Department's decision on the matter of the royalty adjustment to the Navajo Nation.

I am writing to express my objection to Peabody Coal Company's attempt to further delay the adjustment of the royalties due to the Navajo Nation.

The Bureau of Indian Affairs made its decision, pursuant to the lease terms, to adjust the royalty rate over a year ago. We expected then, and expect now, that the Department of the Interior, acting in the best interests of the Navajo Nation as our trustee, will act

promptly to insure that the Navajo Nation receives a fair return for its coal resources.

Peabody's request for postponement simply is not justified. While it is true that the Nation had been, for close to two years, trying to renegotiate the terms of our coal lease with Peabody, the negotiations cannot be characterized as "actively" occurring at this time. It has been some nine months since negotiations with Peabody became stalled over such issues as their requests for additional coal, the very difficult water issues and other important area of concern to both parties.

Since the U.S. Supreme Court decided the *Kerr-McGee v. Navajo Nation* case in our favor, I have discussed the payment of past-due back taxes with Ken Moore, the President of Peabody Coal Company. Royalty rates and the lease itself have not been discussed.

Contrary to Mr. Farrand's assertion, I am not confident that a voluntary agreement can be reached between Peabody and the Navajo Nation on the royalty adjustment and other lease terms.

I urge you to see to it that a final decision for the Department of the Interior upholding the Area Director be made as soon as possible.

Thank you for your assistance.

Sincerely,

/s/ PETERSON ZAH
Chairman
Navajo Tribal Council

cc: Chris Farrand
Peabody Holding Co.

Timothy Vollmann, Esq.
Office of the Solicitor

Mr. John Fritz
Deputy Assistant Secretary

Claudeen Bates Arthur, Esq.
Attorney General
Navajo Nation Department of Justice

Paul Frye, Esq.
200 Lomas Blvd. N.W.
Albuquerque, N.M. 87102

Eric D. Eberhard, Esq.
Navajo Nation Washington Office

K.R. Moore
Peabody Coal Company

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.WR.0260

MEMORANDUM *No memo but include in briefing 4 p.m. by Tim*

TO: Principal Deputy Solicitor

FROM: /s/ TIM VOLLMANN
Associate Solicitor, Indian Affairs

SUBJECT: Appeal of Navajo Area Director's Adjustment of Royalty

By memorandum of July 17, 1985 (attached), the Secretary instructed the Deputy Assistant Secretary - Indian Affairs to refrain from issuing a decision in this appeal and to urge the parties to resolve the matter in a mutually agreeable fashion.

At issue in this administrative appeal is the decision of the Navajo Area Director which, pursuant to a lease between the Navajo Nation and Peabody Coal Company, adjusted the royalty rate. We seek an opportunity to brief the Secretary on this matter.

As a consequence of the Secretary's instruction, the Navajo Nation will likely transfer this appeal to the IBIA pursuant to BIA regulations. 25 C.F.R. §2.19(2)(b). If that happens the Secretary would have to personally assume jurisdiction of the appeal to avoid a decision by the IBIA. This would likely result in a lawsuit by the Navajo Nation. The Secretary's action may be challenged on the issue of ex parte contact if he

has been in communication with Peabody and failure to provide the tribe the due process protections afforded by the administrative appeal process. At a minimum, he would be subject to a deposition.

Furthermore, it appears from the face of the Secretary's memo that he was unaware of the Navajo Nation's response to Peabody's letter (attached). In its letter the Nation makes it clear that it does not favor any stay of the appeal and does not believe negotiations are promising.

Lastly, the Secretary is correct in stating that negotiations had been ongoing when the Area Director issued his decision. However, the Area Director was required to act when he did because of a time deadline in the lease. Ironically, in its appeal Peabody argues that the Area Director's decision was made too *late* to be effective.

Because of the sensitive nature of this appeal, your early review is appreciated.

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

In reply please refer to:
Main Interior, Room 6456

[Aug. 29, 1985]

BIA.WR.0260

Peterson Zah
Chairman, Navajo Tribal Council
Navajo Nation
Window Rock, Arizona 86515

Chris Farrand
Vice President
Peabody Holding Company, Inc.
1120 20th Street, N.W., Suite S-720
Washington, D.C. 20036-3445

Paul E. Frye, Esq.
200 Lomas Blvd., N.W.
Suite 815
Albuquerque, New Mexico 87102

Re: Appeal of Peabody Coal Company of Adjustment of Royalty: Navajo Lease No. 14-20-0603-8580

Gentlemen:

The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal filed by Peabody of the

Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.

As you are aware, the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary-Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized. You of course will be informed when that decision is made.

Sincerely,

/s/ TIM VOLLMANN
Associate Solicitor
Division of Indian Affairs

1. *Expect tough negotiations*

2. *Close to a deal with the Chairman*

3. *Attorneys divided; 60/40 against (hard line coming from Interior staff)*

4. *Zah needs near term revenue willing to accept a 12 1/2% rate but needs something more*

5. *Claudine out of picture but Nelson getting instructions from Washington (Eberhard)*

6. *Washington doesn't believe facts on appeal have been adequately refuted by Peabody*

7. *Hold out for Sect. or under Sect. approval of negotiated package*

August 6, 1987

MR. R. H. BRIDENBECKER

SUBJECT: Indian Lease Negotiations

Attached for your review and comment are drafts of proposed slides and a presentation outline for your use in reporting on the Indian lease negotiations to the Board of Directors and the Management Committee.

/s/ R.M. BERTHOLF

RMB: dw

Attachments

cc: H.F. Huettemeyer
C.G. Thompson
M.D. Monninger

COST-BENEFITS
OF LEASE NEGOTIATIONS

	DO NOTHING	AS AMENDED
ROYALTY RATE –		
NNL	20%	12.5%
JUA	6.67%	12.5%
BACK ROYALTIES DUE (1984-1987)	$100 MILLION	$44 MILLION
BACK TAX LIABILITY (1978-1984)	$33 MILLION	WAIVED
COAL VOLUME	400 MILLION TONS	670 MILLION TONS
WATER - VOLUME –	ENOUGH TO MINE 400 MILLION TONS OF COAL	ENOUGH TO MINE 670 MILLION TONS OF COAL
—ANNUAL COST	$42,000	$3,400,000

[Seal omitted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

To: Whit Field

From: Edwin Winstead

Subject: Navajo & Hopi Coal Lease Amendments: Issues to be considered Prior to Approval

Hopi Lease No. 14-20-0450-5743

1. Amendment 2. *Additional Coal.* This lease amendment allows Peabody to mine an additional 180 million tons of coal. We should consider the need for a NEPA environmental impact study.

This section also requires Peabody to mine twice as much coal from the Hopi lease as from Navajo lease no. 14-20-0603-8580. Since both tribes have apparently agreed to this format, the Department should be able to ratify it without any unfairness to the Navajo Tribe.

Finally this section may require the federal government to examine and approve the surface mining methods used by Peabody. The Department should consider whether it is willing to assume the duties provided in the leases.

2. Amendment 3. *Royalty Rate.* Section C discussed what will happen if uranium ore is discovered on the property. Since uranium mining has a different set of environmental problems, any future mining of this substance may require an EIS.

3. Amendment 6. *Assignment of Lease.* This entire provision allows assignments of the Lease without approval of the Secretary (25 C.F.R. § 211.26). We should clarify that any transfer must be approved by the Secretary.

4. Amendment 10. *Rights-of-way.* Allows the tribe to grant rights of way without the approval of the Secretary pursuant to 25 C.F.R. § 169. It should be made clear that any rights-of-way must be granted by the Secretary.

Navajo Lease Nos. 14-20-0603-8580 and 14-20-0603-9910

1. Amendment 2. *Additional Coal.* As in the Hopi Lease this additional coal may require an EIS.

2. Amendment 5. *Assignment of Lease.* This section requires the Secretary to waive the provisions of 25 C.F.R. § 211.26 for certain transfers.

3. Amendment 11. *Rights-of-way.* This section should be clarified to require the Secretary's approval for any grant of a right of way pursuant to 25 C.F.R. § 169.

General compliance problems with all three leases.

1. The leases do not comply with 25 C.F.R. § 211.2 which requires advertisement for bids prior to leasing. We will need to explain why this situation merits a waiver.

2. 25 C.F.R. § 211.9 limits leasing acreage to 2,560 acres.

3. 25 C.F.R. § 211.10 provides a 10 year time limit.

Other Matters

If the Secretary approves the leases it may be appropriate to disclaim any knowledge or undertaking on the part of the Secretary as to the adequacy of the consideration received by the tribes.

According to the leases the parties will not be bound to the terms of the leases as submitted after the following dates:

A. Navajo Leases—Nov. 9, 1987

B. Hopi Leases—Nov. 30, 1987

MEMO TO: CGT 12/1/87
DATE PREPARED

Re: Lease Amendment Approval

L. Cope talked to Chris Farrand, Peabody's VP in Wash, DC, this afternoon. Mr. Farrand had just left the Solicitor General's Office and things are moving ahead as the various groups are submitting their approvals to the Secretary of the Interior. Apparently Mr. Farrand has also talked to Scty. Hodel who says he will sign the lease amendments. This could take place as early as Thursday, 12/3/87.

cc: HFH FROM: RMB

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

THE NAVAJO NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES (*THIRD SET*)

Defendant United States responds to Plaintiff's Interrogatories (Third Set) as follows:

* * * * *

31. Was the "Coal Leasing Policy on Indian Lands," as stated on the attached exhibit 1, in effect within the Department of the Interior as of November 26, 1975?

ANSWER: Defendant stipulates that the "Coal Leasing Policy on Indian Lands," as stated on the attached exhibit 1, was in effect within the Department of the Interior as of November 26, 1975.

32. If your answer to interrogatory no. 31 is "yes,"

(a) state whether such policy has been modified, rescinded, withdrawn, or otherwise changed or made ineffective since November 26, 1975 and, if so,

(b) state the date or dates of any such modification, withdrawal or rescission, identify the person and means by which it was effected, and identify all documents concerning such modification, withdrawal or rescission.

ANSWER: Defendant knows of no modification to the policy expressed in the memorandum of November 26, 1975 from the Acting Director, Office of Trust Responsibility, of the Bureau of Indian Affairs.

* * * * *

42. Did any study, analysis or report prepared by any person within the Department from January 1, 1984 to January 1, 1988 conclude that the 20% royalty rate for the Lease was not reasonable? If so, identify such study, analysis or report by stating its author, recipient, and date, and by identifying its current custodian.

ANSWER: Defendant knows of no such analysis or report.

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DEFENDANT'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Defendant submits the following responses to Plaintiff's Second Request of Admissions.

* * * * *

95. The policy set by Secretary Andrus in 1977 which established that a 12½% royalty rate should be the absolute minimum in any Indian lease for coal to be mined by surface mining methods was maintained by the Department of the Interior between June 1, 1984 and January 1, 1988.

RESPONSE: Admitted.

* * * * *

108. On August 29, 1985, a decision on the appeal of the Area Director's June 18, 1984 adjustment of the royalty rate on the Lease to 20% was not currently being considered by the Deputy Assistant Secretary and his staff.

RESPONSE: Admitted.

* * * * *

110. Peabody submitted the amendments to the Secretary's office on November 27, 1987 and the approval process of those lease amendments thereupon became a "rush job" within the Department of the Interior.

RESPONSE: Admitted.

111. The attached Exhibit 92 was partly drafted by and is a product of discussions with representatives of Peabody.

RESPONSE: Admitted.

112. The attached Exhibit 94 was partly drafted by and is a product of discussions with representatives of Peabody.

RESPONSE: Admitted.

* * * * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 93-763L
JUDGE BOHDAN A. FUTEY

THE NAVAJO NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Received Dec. 15, 1997]

PROPOSED FINDINGS OF UNCONTROVERTED FACT

Paul E. Frye
Attorney for Plaintiff
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* * * * *

21. Peabody is the world's largest private coal producer. Peabody Group Webage (visited Nov. 26, 1997) http://www.peabodygroup.com/pHCIHome.hmtl, III App. 1811.

* * * * *

24. Mohave is operated by the Southern California Edison Company ("Edison"), one of the nation's two or three largest investor-owned utilities. Bridenbecker Dep. at 8, 66, II App. 917, 925.

* * * * *

51. By 1983, Peabody's sales of Navajo coal under the 8580 surpassed $141 million, yet the Navajo Nation had received less than $2.7 million in royalties for that coal. Council of Energy Resource Tribes, "Navajo Nation Peabody Coal Selling Price and Royalty Analysis" at Fig. 6 (Jan. 1985), I App. 364.

52. In 1978, the Acting Regional Audit Manager of the DOI Office of Audit and Investigation, "[b]ased on the apparent inequitableness of the royalty rates," urged the BIA "to exercise its trust responsibility and attempt to have these [Peabody] leases amended. . . ." Memorandum from Acting Regional Audit Manager, DOI, to Area Directors, Phoenix and Navajo Area Offices 3 (June 28, 1978), I App. 202.

* * * * *

54. In 1979, the BIA and the United States Geological Survey inspected Peabody's mines and found that Peabody's lease violations regarding reclamation, rights-of-way and waste "warrant our consideration of a recommendation to cancel the leases." Letter from Donald Dodge, Area Director, Navajo Area Office, to Peabody Coal Company (Sept. 4, 1979), I App. 204.

* * * * *

56. Peabody then obtained the assistance of Peter MacDonald, Chairman of the Navajo Tribal Council, who reported to the BIA that Peabody had agreed to

renegotiate its leases, "with any renegotiated terms to be retroactive to January 1, 1980." Letter from Peter MacDonald, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Navajo Area Office, BIA (Dec. 19, 1979), I App. 207. MacDonald requested that the BIA "suspend its administrative activities" relative to the leases for three months "so that this renegotiation can proceed without undue duress." *Id.*

* * * * *

59. After fourteen months passed without any renegotiated agreement, the Window Rock Field Solicitor recommended to the BIA's Assistant Area Director for Resources that the BIA require Peabody to apply for a right-of-way for its access road. Memorandum from Field Solicitor, Window Rock, DOI, to Assistant Area Director (Resources) (April 27, 1981), I App. 212. Tom Lynch, the Assistant Area Director for Resources, demurred because

> [a]pprox. 2 wks ago Mr Moore of Peabody advised that agreements with [Peabody's] customers have been worked out resulting in increased royalty to Tribe of not less than 12½% and water sales from present $5.00 per acre foot to $50.00 per acre foot per year [sic]. Final proposal to Tribe is to be presented Tribe (when?) soon.

Id. at handwritten note (April 30, 1981); Back Dep. at 80-82, II App. 869-70.

* * * * *

64. On March 28, 1984, five months prior to the twentieth anniversary of the approval of the 8580 Lease, the Navajo Nation requested that the Secretary

of the Interior adjust the royalty rate of that Lease pursuant to Article VI thereof. Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Hon. William Clark, Secretary, Department of the Interior (March 28, 1984), I App. 223. The royalty in effect at that time was approximately 37 cents per ton, which translated to a 2% royalty rate on Peabody's gross proceeds. *Id.* at 1.

65. The Acting Assistant Area Director responded to Zah's request and stated that

> [s]ince the lease renegotiation efforts of the Navajo Tribe have been unfruitful to date, we are pursuing our responsibility to ensure compliance with the terms of the lease by implementing an adjusted royalty rate as called for by the said lease.

Letter from Jack Kyselka, Jr., Acting Assistant Area Director, Navajo Area Office, BIA, to Peterson Zah, Chairman, Navajo Tribal Council (April 19, 1984), I App. 228.

* * * * *

67. At the request of the Navajo Nation, Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Donald Dodge, Area Director, Navajo Area Office, BIA (April 2, 1984), I App. 229, the Navajo Area Office notified Peabody of additional lease violations that were causing "a substantial loss in revenues for the Navajo Tribe." Letter from Floyd Espinoza, Acting Area Director, Navajo Area Office, to Peabody Coal Company (April 25, 1984), I App. 233.

68. The BIA Division of Energy and Mineral Resources ("E&M") is the DOI agency responsible for providing technical assistance to the BIA and federally-

recognized Indian tribes in the leasing of energy minerals on Indian lands. 130 DM § 10.5, I App. 88.

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70. The BIA also sought to enter into a Memorandum of Understanding ("MOU") with the Bureau of Mines ("BOM") to analyze the economics of the Peabody mine and assist in determining a reasonable royalty rate for the 8580 Lease. In commenting on the draft BIA/BOM MOU, the Field Solicitor urged that the study be a top priority, because the Navajo Nation's "loss in royalty may be $50,000 per day." Memorandum from Field Solicitor, Window Rock, to Area Director 2 (May 11, 1984), I App. 245.

* * * * *

75. BOM performed a study under the MOU which supported a royalty rate adjustment to 20%. Bureau of Mines, "Analysis of the Financial Aspects of a Reevaluation of the Royalty Terms of the Kayenta Lease Area Between the Navajo Indian Tribe and Peabody Coal Company, Inc." 10 (June 6, 1984), I App. 280.

76. The BIA's Area Real Property Management Officer reviewed the analyses of E&M and BOM and determined that "[t]he Bureau of Mines report is more reasonable and justifiable." The officer thus recommended to the Area Director "a royalty adjustment of 20.0 percent as a final adjustment decision by your office." Memorandum from Area Real Property Management Officer to Area Director (June 15, 1984), I App. 286.

77. Navajo Area Director Dodge, under authority delegated by the Secretary of the Interior, adjusted the royalty rate to 20% after a thorough review with and the concurrence of his Washington superiors and the Solicitor's Office. Letter from Donald Dodge, Area Director, Navajo Area Office, to Kenneth R. Moore, Arizona Division, Peabody Coal Company (June 18, 1984), I App. 287; Dodge Dep. at 41-44, II App. 996-99; Fritz Dep. at 83, II App. 1066.

THE APPEAL OF THE AREA DIRECTOR'S ROYALTY ADJUSTMENT DECISION

78. SRP and Edison (on behalf of themselves and the other NGS and Mohave participants) and Peabody all appealed from the Area Director's decision, invoking the appeal procedures of 25 C.F.R. Part 2, I App. 25 (collectively, the "Appeal"). I App. 290, 291, 293 (notices of appeal). Greg Leisse represented Peabody in the Appeal. I App. 290. Tom Reilly represented Edison. I App. 292. Fred Martone represented SRP. I App. 294.

* * * * *

81. Peabody, SRP and Edison then met to develop a strategy. At that meeting, Moore stated Peabody's "hope for Secretarial recommendation to settle new rate [and to] open negotiations between Navajo & PC/SR/SCE." Notes by Hermann F. Huettemeyer, Manager, Fuel Supply, Edison (July 13, 1984), I App. 298 (concerning meeting SRP Director of Resource Planning Darrell Smith and Peabody's Gerald Grow, Moore and Leisse). Greg Leisse was designated the "key contact." *Id.*; Leisse Dep. at 150-51, III App. 1328-29.

* * * * *

83 At that time, Fritz held the positions of Acting Assistant Secretary of the Interior and Deputy Assistant Secretary-Indian Affairs (Operations), and performed the functions of the former "Commissioner of Indian Affairs." Fritz Dep. at 10, 85, 109, II App. 1048, 1067, 1076.

* * * * *

85. Edison instructed its attorney Reilly to "proceed[] on maximum delay mode in the appeal of the 20% royalty rate." Memorandum from H.F. Huettemeyer to Larry Cope (Sept. 14, 1984), I App. 301; Huettemeyer Dep. at 62, II App. 1175.

* * * * *

88. Vollmann and one of his subordinates in the Solicitor's Office, Colleen Kelley, in conjunction with E&M Chief Joe Johnston, reviewed the procedural options for the Appeal. Ultimately, Fritz opted to make the decision himself, in accordance with 25 C.F.R. Part 2. Note from Colleen [Kelley] to Joe [Johnston] (Sept. 11, 1984), I App. 305 (attaching a copy of a draft memorandum from Associate Solicitor, Indian Affairs, to Deputy Assistant Secretary—Indian Affairs (Operations)(n.d.)); Memorandum from Associate Solicitor, Indian Affairs, to Deputy Assistant Secretary—Indian Affairs (Operations) (Sept. 13, 1984), I App. 309; Kelly Dep. at 29-30, II App. 1274-75; Vollmann Dep. (Sept. 21, 1995) at 85-99, III App. 1593-1607.

89. The Associate Solicitor pointed out that the parties had negotiated unsuccessfully for 10 years, that a decision on the appeal was of "vital importance" to the Navajo Nation, and that a court challenge to any decision was likely. Memorandum from Associate

Solicitor, Indian Affairs, to Deputy Assistant Secretary —Indian Affairs (Operations) 1 (Sept. 13, 1984), I App. 309.

90. None of the possible procedures listed by the Associate Solicitor included a direct appeal to the Secretary of the Interior because under such a procedure " it is difficult to control or have a meaningful administrative appeal process which protects against *ex parte* communication, that sort of thing." Vollmann Dep. (Sept. 21, 1995) at 87, II App. 1595.

* * * * *

101. Peabody, SRP and Edison filed a joint brief in the Appeal and relied on a report prepared by Peterson & Company. Peterson & Co., "Analysis of a Reasonable Adjustment of Navajo Coal Lease Royalty Rates" (Nov. 28, 1984), I App. 318 (reproduced at Peabody Coal Company, *et al.*, Appeal Under 25 C.F.R. Part 2, In the Matter of Appeal of the Navajo Area Director's Adjustment of Royalty, Peabody Lease No. 14-20-0603-8580, Ex. I (Nov. 30, 1984)). That report concluded that "a reasonable royalty rate would be in the range of 5.57% to 7.16% of the gross realization of coal sold under the 1964 [8580] lease." *Id.*, Executive Summary at i, I App. 319. This is about one-half of the minimum royalty rate for federal coal mined by surface mining methods under the Federal Coal Lease Act Amendments of 1976. *Compare id. with* 30 U.S.C. § 207(a).

* * * * *

103. The Navajo brief urged that a royalty rate of 20% be affirmed, or– if it were not– that the 8580 Lease should be terminated based on Peabody's failure to

comply with its terms and which Interior regulations. Answer Brief of the Navajo Tribe of Indians, *supra*, at 32-34, I App. 329-31.

104. Peabody, SRP and Edison, through attorneys Fred Martone and Tom Reilly, wrote to Fritz seeking an opportunity to file a supplemental statement of fact and requesting oral argument. Letter from Frederick J. Martone, Esq., Jennings, Strouss & Salmon, and Thomas J. Reilly, Snell & Wilmer, to John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations) (Feb. 22, 1985), I App. 454. The companies did not seek an evidentiary hearing. *Id.*

105. The Navajo Nation opposed the companies' request, primarily because of the delay it would cause in deciding the Appeal. Letter from Paul E. Frye, staff attorney, Navajo Nation Department of Justice, to John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations) (Feb. 25, 1985), I App. 457; Fritz Dep. at 117-19, II App. 1081-83.

106. In the meantime, Fritz assigned to the Solicitor's Office much of the responsibility for preparation of the decision on the Appeal. Fritz Dep. at 113-14, 123, II App. 1077-78, 1085. Colleen Kelly was a assigned to gather information for that office. *Id.* at 123, II App. 1085. Fritz took special care to assure that his decision on the Appeal would be rational, thoughtful and supported by the facts and law. *Id.* at 114-16, II App. 1078-80.

107. Kelly sought the assistance of Vijai N. Rai, Ph. D., a geologist with E&M. Rai Dep. at 46, III App. 1452.

108. Dr. Rai examined the Appeal briefs and the reports of Peterson and Company, Peabody Coal Company–Arizona Division, F.R. Schwab & Associates,

Council of Energy Resource Tribes, BOM, and E&M. Memorandum from Vijai N. Rai., Geologist, E&M, to Colleen Kelley, Office of the Solicitors–Division of Indian Affairs 2-3 (Feb. 26, 1985), I App. 460-61.

109. Dr. Rai concluded as follows:

> In summary, based on data currently available, a 20% royalty rate determination appears reasonable and defensible. In the appeal decision, we recommend that the Area Director's 20% royalty rate determination be sustained. However, Peabody should be granted a 60 to 90 day time period in which to provide economic data to substantiate its contention that a 20% royalty rate is unreasonable. If Peabody were to provide the actual data with respect to its cost, investment, and revenues, the Bureau of Indian Affairs should reevaluate its royalty determination in light of such data.

Id. at 5-6, I App. 463-64; *see* Rai Dep. at 49, III App. 1453.

110. Fritz granted in part and denied in part the companies' request of February 22, 1985. Letter from John W. Fritz, Deputy Assistant Secretary–Indian Affairs (Operations), to Gregory J. Leisse, Peabody Coal Company (March 4, 1985), I App. 465; Fritz Dep. at 117-19, II App. 1081-83. Fritz felt oral argument would serve no useful purpose, and denied that request. Fritz Dep. At 118-19, II App. 1082-83. However, Fritz allowed the companies to submit a supplemental fact statement. Letter from John W. Fritz (March 4, 1985), I App. 465.

111. In conformity with Dr. Rai's recommendation, Fritz also granted Peabody an extraordinary opportunity to provide data necessary to support assertions made but not supported in its brief, as follows:

> We have been reviewing the briefs and exhibits submitted by the Tribe and by the appellants in this appeal, and it has come to our attention that the cost of operating [the 8580 Lease] was a key factor in certain reports relied upon by the Area Director. The cost figures were admittedly estimates formulated by the reports' authors. In appellants' brief, Exhibit I at page 8, it is stated that these estimates "are unreasonable even with respect to industry data." It would be helpful for our review if Peabody was explicit in its arguments about what are reasonable cost figures.
>
> Consequently, we are requesting Peabody to submit its actual cost, revenue, and investment figures for this lease, including the overriding royalties, if any, paid to assignor Sentry Royalty Company or its successor. Pursuant to 25 C.F.R. § 2.16, we will stay our consideration of this appeal for three weeks to allow you to submit these costs. If Peabody declines to submit them, we shall make our decision in this appeal on the record as it now stands.

Id.; *see* Fritz Dep. at 122-23, 125, II App. 1084-85, 1086; Kelly Dep. at 57, II App. 1279.

112. Upon reading Fritz' letter, Tom Reilly, Edison's outside counsel in the Appeal, advised Larry Cope, Edison's in-house counsel, that:

> I suspect that this is just about the worst possible letter that could have been received by Peabody Coal Company. Perhaps I misjudge the tone of the letter, but I think the train is coming down the track

> and the Department is preparing to support the decision of the Area Director.

Letter from Thomas J. Reilly, Snell & Wilmer, to Larry Cope, Southern California Edison Company (March 11, 1985), I App. 468.

113. Cope forwarded Reilly's letter to R.H. Bridenbecker, the Edison executive ultimately responsible for the royalty rate matter. Memorandum from Larry R. Cope to R.H. Bridenbecker (March 18, 1985), I App. 467.

114. Fritz' letter of March 4, 1985, prompted the companies to intensify their behind-the-scenes efforts. Peabody, SRP, and Edison immediately sought a meeting with Secretary Hodel and deciding official Fritz. *See* Memorandum from Frank K. Richardson, Solicitor, to Secretary of the Interior (March 12, 1985), I App. 470; Kelly Dep. at 59-62, II App. 1280-83; Sullivan Dep. at 14-15, III App. 1559- 60.

115. Secretary Clark had rejected all attempts by the companies to communicate *ex parte* with him. Fritz Dep. at 107, II App. 1075 (Clark had a "very strict rule" against *ex parte* contacts to which he and Solicitor Richardson, both former justices of the California Supreme Court, adhered).

116. However, Clark was replaced by Donald Hodel as Secretary in February 1985. Hodel Dep. at 20-21, II App. 1143-44.

117. Solicitor Richardson reiterated his advice to Secretary Hodel:

> We recommend that you not discuss this administrative appeal or associated issues with Peabody primarily because it would raise the problem of *ex*

> *parte* contact. Deputy Assistant Secretary Fritz has already decided he cannot meet with Peabody because in his case it would clarly constitute *ex parte* contact. In the event you do decide to discuss this with Peabody, recent court decisions indicate it would be appropriate to grant the Navajo Tribe a similar opportunity to discuss this issue with you. *E.g., Dawn Mining Co.* v. *Clark*, No. C-82-974-JLO, U.S.D.C. E.D. Wash., December 19, 1984.

Memorandum from Frank K. Richardson, Solicitor, DOI, to Secretary of the Interior (March 12, 1985), I App. 470-71.

118. Hodel took a different approach than Clark, however, Fritz Dep. at 148-49, II App. 1098- 99:

> Secretary Clark and Judge Richardson stopped *ex parte* meetings, but then after Secretary Hodel arrived back from [the Department of] Energy those requests went to him. . . . I saw a large number of industry people arrive back at the building, people who hadn't been around when Secretary Clark was there in the building. They had been there, but only in formal functions.

Those people included Howard Allen, President of Edison. *Id.* at 149, II App. 1099.

119. Farrand confirmed arrangements for a meeting without Navajo participation to be held on March 19, 1985, between DOI representatives–including Fritz or his representative–and high-ranking executives of Peabody, SRP and Edison. Letter from Chris Farrand, Vice President, Government Relations, Peabody Holding Company, Inc., to Hon. Frank Richardson, Solicitor, DOI (March 15, 1985), I App. 473. Farrand wrote: "We also understand that Secretary Hodel may

be able to stop by the meeting if his other commitments permit." *Id.*

* * * * *

123. About two weeks later, on April 16, 1985, the United States Supreme Court upheld the validity of Navajo tax laws enacted in 1978 that applied to Peabody. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

124. Because of that decision, Edison's Vice President in charge of fuels observed that "April 16th becomes the Navajo 4th of July." Bridenbecker Dep. at 90-91, II App. 930-31. Edison's attorneys determined that the Navajo taxes could be lawfully collected retroactively to 1978. *Id.* at 92-93, II App. 932-33. Edison was thus "concerned that [the *Kerr-McGee* decision] left us in a position of significant exposure in terms of fuel cost." *Id.* at 91, II App. 931; *see* Bertholf Dep. at 37, II App. 894.

125. Edison was "surprise[d]" by the *Kerr-McGee* decision. Huettemeyer Dep. at 81, II App. 1181. As Huettemeyer elaborated: "Well, this was the Supreme Court. We thought we would win at the Supreme Court, and we lost 8-0, because one judge was absent." *Id.*

126. The Navajo taxes also applied to the slurry pipeline that extends from the Peabody mine to Mohave, and the cost implications of this tax burden also concerned Edison. *Id.* at 82-84, II App. 1182-84. By 1987, Edison calculated that it owed the Navajo Nation $33 million in back taxes. R.M. Bertholf, "Cost-Benefits of Lease Negotiations" (Aug. 6, 1987), I App. 635-36; Huettemeyer Dep. at 127- 28, II App. 1190-91.

PREPARATION OF THE DECISION ON THE ROYALTY ADJUSTMENT APPEAL

127. In light of Peabody's refusal to supply the data he requested, Fritz sought further technical assistance from BOM. Fritz Dep. at 134-36, II App. 1087-89. Fritz "wanted the evaluation of the economic impact to be done by somebody who had the knowledge, skills and ability to make an appropriate evaluation, and I also wanted it to be as objective as possible." *Id.* at 134-35, II App. 1087- 88.

128. BOM assigned a mineral economist and a mining engineer to collaborate on the analysis. Davidoff Dep. at 9, 46-52, II App. 980, 983-89; Perlewitz Dep. at 8-10, 39-43, III App. 1435-37, 1439-43.

129. BOM's Perlewitz and Davidoff produced an initial report and an addendum to that report which fine-tuned the analysis. Philip C. Perlewitz and Robert L. Davidoff, "An Engineering and Economic Analysis of the Kayenta Lease Area" (April 24, 1985), I App. 499; Philip C. Perlewitz and Robert L. Davidoff, "Addendum to an Engineering and Economic Analysis of the Kayenta Lease Area" (May 6, 1985) (hereinafter "BOM Addendum"), I App. 520.

130. That analysis concluded that Peabody's rate of return would range from 20.1% to 32.4% if the 20% royalty rate were upheld. BOM Addendum, *supra*, at 19, I App. 538; Davidoff Dep. at 55, II App. 990.

131. E&M Mining Engineer D.L. Cramer Bornemann reviewed the BOM analysis and found it to be competent and based on sound assumptions and methodology. Bornemann Dep. at 71-72, II App. 911-12.

132. Dr. Rai made sure that the BOM analysis employed correct assumptions and he reviewed its conclusions. Rai Dep. at 62-63, 80, III App. 1454-55, 1456.

133. Dr. Rai made sure that the BOM study, Dr. Rai refined his own earlier report of February 26, 1985, *see supra* ¶¶ 108-09. Dr. Vijai N. Rai, Geologist, E&M, Draft "Report on the Issue of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine), Navajo Reservation" (rec'd May 17, 1985), I App. 543. Kelley reviewed that revised report and suggested modifications. *Id.* at 4 (marginalia), I App. 547.

134. Dr. Rai then produced his final report. Dr. Vijai N. Rai, Geologist, E&M, "A Report on the Issues of Royalty Rate Adjustment for Lease No. 14-20-0603-8580 (Kayenta Coal Mine), Navajo Reservation" (n.d.) (hereinafter "Rai Report"), I App. 554.

135. There, Dr. Rai found that the "coal deposits under lease to Peabody are exceptionally valuable." *Id.* at 8, I App. 562; *see* Rai Dep. at 81, III App. 1457. Dr. Rai's conclusions are unequivocal:

> V. Conclusion
>
> Based on a review and analysis of all the information currently available, a royalty rate adjustment to 20 percent of the gross value of the coal mined from the subject lease appears justifiable and defensible.
>
> VI. Recommendation
>
> We recommended that the Area Director's decision to adjust the royalty rate to 20 percent of the gross value of the coal mined from the subject lease be sustained. Rai Report at 9, I App. 563.

136. No study, analysis or report prepared by any person within the Department between January 1, 1984 to January 1, 1988 concluded that the 20% royalty rate for the 8580 Lease was not reasonable. Def.'s Resp. to Pl.'s Interrog. No. 42, III App. 1708; Aubertin Dep. Vol. I at 154-55, II App. 816-17.

* * * * *

138. Colleen Kelley of the Solicitor's Office drafted Fritz' decision document for the Appeal. Kelley Dep. at 68-70; II App. 1285-87. The document was typed on or about June 18, 1985. *Id.* at 70, II App. 1287.

139. Fritz, Kelley, Assistant Solicitor Whit Field and probably Vollmann went through the draft decision line-by-line. Fritz Dep. at 142-45, 156-57, II App. 1092-95, 1101-02.

140. Fritz sought to have the decision on the Appeal be the "model in effect for how we were going to go about doing things and how we were going to do the economic analysis and that sort of thing." *Id.* at 145, II App. 1095.

141. In the latter half of June or early July 1985, the decision document was finalized, copied and awaiting Fritz' signature. *Id.* at 140-42, II App. 1090-92. However, Fritz was on travel and was unavailable to sign it then. *See id.* at 142, II App. 1092.

142. The decision document, indeed, was readied for mailing to all counsel in the Appeal. Unsigned Letter from Deputy Assistasnt Secretary–Indian Affairs to Gregory J. Leisse, *et al.*, ("Decision Document") at 1, I App. 566 (check mark by counsel Martone's name); Neidernhofer Dep. at 74, III App. 1424; Everette Dep. at 53, II App. 1001 ("Q. Okay. Does the check mark

around Mr. Martone's name indicate anything to you? A. That this copy was sent to him."); Crosby Dep. at 35, II App. 966 ("Q. What does that check mark signify to you? A. That this copy should go to him or the copy that had that mark should go to him."); Wilkinson-Flavin Dep. at 125-26, III App. 1652-53.

143. The Decision Document was thought by some to have been signed by Fritz, but Fritz testified that he did not sign it. *Compare* Ryan Dep. at 102, III App. 1495, *and* Crosby Dep. at 35, II App. 966 *with* Fritz Dep. at 141-42, II App. 1091-92. Fritz testified that the Decision Document was "close to 100 percent" final. Fritz Dep. at 140-47, II App. 1090-97.

144. The Decision Document relied heavily on the technical work of BOM and Dr. Rai. Kelley Dep. at 65, II App. 1284. *Compare* Decision Document at 4-6, I App. 569-71, *with* Rai Report at 7-9, I App. 561-63.

SUPPRESSION OF THE ROYALTY ADJUSTMENT APPEAL DECISION

145. Peabody's President Moore arranged a lunch meeting with Navajo Chairman Zah on July 1, 1985. Moore Expense Report (July 1985), I App. 572. Shortly thereafter, Moore informed Edison's Bridenbecker that "he had dinner with Zah. Zah said wouldn't talk about leases as has gone so far in appeal process. Wanted to talk about tax matters-concerned about retroactivity–Moore told him unfair and we would fight[.]" Notes of Richard M. Bertholf (July 3, 1985), I App. 573 (marginalia); *see* Bertholf Dep. at 37-38, II App. 894-95.

146. At that meeting, Zah expressed his reluctance to negotiate amendments to the 8580 Lease and his hope that the Appeal would be decided in favor of the Navajo position. Moore Dep. (May 29, 1996) at 147, III

App. 1391 ("I remember having dinner with Pete and him telling me that he thought they wouldn't negotiate any further at the time. He thought maybe, just like it says here, not for sure but the appeal may be decided in their favor.")

* * * * *

149. Edison learned, probably from Peabody, that the decision document awaiting Fritz' signature would affirm the 20% royalty rate. Bridenbecker Dep. at 100-01; II App. 937-38. Peabody's practice was to inform SRP and Edison equally of such significant events. Leisse Dep. at 133, III App. 1324.

150. Farrand immediately wrote to Secretary Hodel. Letter from Chris Farrand, Vice President, Government Relations, Peabody Holding Company, Inc., to Hon. Donald P. Hodel, Secretary of the Interior (July 5, 1985), I App. 577. Peabody did not follow its usual protocol with Edison by allowing Edison prior review of the letter because "there wasn't time." Notes of Richard M. Bertholf ¶ 4 (July 3, 1985), I App. 573.

151. Farrand's July 5, 1985 letter was routed to the BIA's Office of Trust Responsibilities by the Executive Secretariat in the ordinary course of business. *See* Letter from Chris Farrand (July 5, 1985), at 1, I App. 577 (marginalia indicating routing to "code 200"); Vollmann Dep. (Sept. 21, 1995) at 154, III App. 1615 (code 200 was for the BIA's Office of Trust Responsibilities).

152. SRP took matters into its own hands. On July 12, 1985, SRP's Director of Resource Planning provided to its Assistant General Manager for Governmental Affairs "some background information to assist you in whatever discussions you may have with Secretary Hodel and/or others." Memorandum from Darrell E.

Smith, Director, Resource Planning, SRP, to D.M. Rappaport, Assistant General Manager, Government Affairs, SRP 1 (July 12, 1985), I App. 579. Copies of that memorandum were provided to Leroy Michael, Jr., SRP's Assistant General Manager, and R.H. Silverman, SRP's General Counsel. *Id.* at 2, I App. 580.

153. The background information provided for Rappaport highlighted the additional coal royalties that would be borne by all NGS participants collectively, and SRP and BOR individually, if the royalty rate were finally adjusted to 20% or to the 12½% the companies hoped to achieve. *Id.* at attached table ("Amended Navajo Coal Supply Agreement, Indian Royalties"), I App. 582. For Arizona water costs (of BOR), this impact amounted to $177.5 million over existing royalty costs, and $85 million more than the 12.5% federal minimum that SRP hoped to achieve if the Secretary forced the Navajos to the bargaining table. Leroy Michael, Jr., "Impact of 20% Indian Coal Royalty on Arizona's Water and Electric Users" (n.d.) (hereinafter "Impact of 20% Royalty"), I App. 585; *see* Michael Dep. at 21-22, III App. 1345-46 (memos in all capital letters are those of Leroy Michael, Jr., SRP's Assistant General Manager). The difference in royalties for all NGS participants was estimated at $347.5 million when 20% royalty rate was compared with the federal minimum rate of 12½%. "Impact of 20% Royalty" at 1, I App. 585; Michael Dep. at 159-60, III App. 1368-69.

154. SRP provided this information to lobby Interior officials. Smith Dep. at 98-100, III App. 1541-43.

155. Michael also focused on the "United States' 24.3% interest in the Navajo Generating Station" in a handwritten memorandum to Rappaport. Handwritten

Draft Memorandum from Leroy Michael, Jr., to D.M. Rappaport 1 (n.d.), I App. 588.

156. Michael repeatedly warned that if the 20% royalty rate were affirmed for the 8580 Lease, "20% royalty will become the standard for the 1882 Reservation Lease [the 9910 Lease], as well." *Id.* at 2, I App. 589; Memorandum from Leroy Michael, Jr., to Mike Rappaport 2 (rec'd July 15, 1985), I App. 592 ("If the coal mined from the 1934 [8580] Lease goes to 20% royalty, the pressure to increase the royalty for coal from 1882 area will be a near impossible factor to deal with."); Michael Dep. at 146-48, III App. 1365-67.

157. Edison agreed with this view. Bridenbecker Dep. at 40-41, 103-04, II App. 920-21, 940-41.

158. Another SRP strategy to subvert the lawful appeal process was to have the Arizona congressional delegation intercede directly with Secretary Hodel. Handwritten Draft Memorandum from Leroy Michael, Jr., to D.M. Rappaport at 3 (n.d.), I App. 590; Memorandum from Leroy Michael, Jr. to Mike Rappaport at 1, 2 (rec'd July 15, 1985), I App. 591-92; Michael Dep. at 134-38, III App. 1360-64.

159. Edison's Bridenbecker was dissatisfied with Peabody's efforts to influence Hodel and, in essence, directed Peabody to retain Stanley W. Hulett, an extremely close friend and business associate of Hodel, to intercede directly with Hodel about the Appeal. Bridenbecker Dep. 97-105, II App. 934-42; Hulett Dep. (May 15, 1996) at 17, 25, 60-61, II App. 1220-21, 1237-38.

160. Hulett scheduled meetings with Hodel and Fritz on July July 16, 1985. Memorandum from R.M. Bertholf to file (July 16, 1985), I App. 593; Hulett Dep. (May 15, 1996) at 31-37, 72, II App. 1223-29, 1243.

161. At Moore's request, Peabody's Washington D.C., counsel, Edward Sullivan, arranged a dinner meeting with Leisse and Hulett in Washington on July 11, 1985. Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595; Leisse Dep. at 30, III App. 1316.

162. Leisse prepared Hulett to discuss the companies' view of the merits of the appeal with both Hodel and Fritz–it was to be a "gut issue" of Hulett's communications with Interior officials. Hulett Dep. (May 15, 1996) at 71, II App. 1242. Hulett admitted that his "mission . . . was to get the Secretary to prevent the royalty from going into effect at the point at which it had then been set . . . ." *Id.* at 11, II App. 1219; *see id.* at 32, 47, 62-63, II App. 1224, 1231, 1239-40.

163. A Peabody memorandum correctly summarizes the events of July 11, 1985 to July 17, 1985. Sullivan Dep. at 28-29, III App. 1561-62. It reads as follows:

COMPANY MEMORANDUM

TO: F.L. Barkofske – CONFIDENTIAL
DATE: July 22, 1985

FROM: E.L. Sullivan

RE: *Navajo Lease Royalty Rate Adjustment*

Ken Moore, President of Arizona Division, contacted me by telephone on July 11, 1985, and requested that I arrange a dinner meeting for Greg Leisse and a Mr. Stan Hulett. The President of Southern California Edison Company (So. Cal.) had recommened Mr. Hulett to Ken Moore. Mr. Hulett was a former upper level Department of the Interior employee whom So. Cal. believed may have some

influence with the current Secretary of the Interior (Don Hodel). The dinner meeting was arranged to consider the prospect of Mr. Hulett discussing the Navajo Lease royalty rate adjustment with Secretary Hodel. Chris Farrand was informed of this matter and suggested that if it appeared that Mr. Hulett possessed the type of influence which would be required that we should make use of his services.

After our meeting with Mr. Hulett, Greg Leisse and I discussed the pros and cons of having Mr. Hulett act on Peabody's behalf. This included, among others, consideration of the following: (1) whether this activity would be considered an "*ex parte*" contact as part of Peabody's appeal of the Navajo Area Director's decision; (2) whether Mr. Hulett possessed the requisite influence; (3) the fact that So. Cal. recommended that Peabody make use of Mr. Hulett's services in the matter of the royalty rate adjustment; (4) the cost of Mr. Hulett's services; and (5) the interplay of a contact by Mr. Hulett on Peabody's behalf with the recently sent letter from Chris Farrand.

After weighing all factors, Greg and I agreed that we should allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz (Deputy Assistant Secretary, Bureau of Indian Affairs) and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the issue without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo–

drafted in large part by Greg [Leisse] and myself–addressed to Mr. Fritz instructing him to (1) not make an untimely decision on the appealed case itself, and (2) encourage the parties to negotiate their differences.

I have been informed that the memo was delivered to Mr. Fritz's office on Monday, July 22, 1985.

Compensation for Mr. Hulett's services, according to Ken Moore, will be paid by the Arizona Division and will be passed on to our customer when coal shipments resume. The fee will be paid as a retainer, and spread over the remainder of the year (July-December) and will be in the range of $1,500–$2,000 per month. This arrangement will avoid the budgetary effects of a lump sum payment and will also allow Peabody to avail itself of Mr. Hulett's services again this year if such is deemed desirable. With Ken Moore's approval, Greg Leisse and I have been authorized to negotiate a firm monthly fee for Mr. Hulett within the range set out above.

I am available to provide additional information.

ES/mm /s/ E.L.S.

Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595-96.

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165. The Navajo Nation was unaware of these *ex parte* contacts between Peabody and Interior officials. Hulett Dep. (June 24, 1997) at 24, 49-50, II App. 1245, 1248-49 (". . . I had no contacts with the Tribe at that

point that it would have made any sense for me to pick up the phone and say hey, oh, by the way, I'm going to do this to you."); Leisse Dep. at 68-69, III App. 1320-21.

166. However, the Navajo Nation did receive a copy of Farrand's July 5, 1985 letter to Secretary Hodel, and responded to it. Letter from Paul E. Frye, Navajo Nation Department of Justice, to Hon. Donald P. Hodel, Secretary of the Interior (July 11, 1985), I App. 599. In that response, the Navajo Nation objected to Peabody's attempt to circumvent the appeal procedures that it had initiated, stated that there were then no ongoing negotiations, and again urged that a decision on the Appeal be made "with all deliberate speed." *Id.* at 2, I App. 600.

167. As a result Farrand's and Frye's letters, the Solicitor's staff added one paragraph to the Decision Document " as sent forward for signature," as follows:

> On July 5 Peabody requested that the Secretary assume direct responsibility of this appeal and either postpone a decision or issue one in its favor. Peabody contended that delaying the decision would encourage a voluntary settlement of new lease terms. The Navajo Nation responded on July 11 that no negotiations were pending and urged the Department to issue a decision upholding the Area Director. We do not believe any delay in our consideration of the appeal is warranted without the support of both parties. Consequently, I am now issuing this decision affirming the Area Director.

Unsigned Letter from Deputy Assistant Secretary–Indian Affairs to Gregory J. Leisse, Peabody Coal Company, *et al.*1 (marginalia), 6 (n.d.) ("Revised Decision Document"), I App. 602, 607. The note "as sent

forward for signature" on the first page of the Revised Decision Document is in the handwriting of Tim Vollmann, then Associate Solicitor for Indian Affairs. Everette Dep. at 59, II App. 1002.

168. The Revised Decision Document "as sent forward for signature" again "conclude[d] that 20% is a reasonable royalty rate and affirm[ed] the Area Director's decision." Revised Decision Document at 6, I App. 607. The Revised Decision Document again was intended to be "final for the Department." *Id.* And, for the second time, the Solicitor's Office rejected a procedure under which the Secretary would assume jurisdiction over the appeal. *Id.*; *see* Vollmann Dep. (Sept. 21, 1995) at 87, III App.1595.

169. The Revised Decision Document was forwarded to Fritz for his signature on or about July 15, 1985–the same day Sullivan and Leisse finished drafting the memorandum for Hodel's signature that would order Fritz to suppress the decision. Memorandum from Thorton W. "Whit" Field, Assistant Solicitor, Land and Minerals Branch, Division of Indian Affairs, to Deputy Assistant Secretary–Indian Affairs (July 15, 1985), I App. 609; Vollmann Dep. (Sept. 21, 1995) at 146-47, III App. 1613-14.

170. Before Fritz could sign the decision, he received orders from Secretary Hodel in the form of a July 17, 1985 memorandum. Memorandum from Donald Paul Hodel to John Fritz (July 17, 1985) (hereinafter "Hodel Memorandum"), I App. 613. The body of the memorandum signed by Hodel is identical to that drafted by Peabody's attorneys, with the exception of one word in the first line (Peabody's "attached "was changed to "enclosed"). *Compare id.*, I App at 615-16,

with Memorandum from E.L. Sullivan (July 22, 1985), at attached Peabody draft, I App. 597-98.

171. Although Fritz was "on the road" a lot from July 5, 1985 to August 5, 1985, Fritz Dep. at 165, II App. 1108, Hulett's July 16, 1985 meeting with Fritz ensured that Fritz would not act between then and when Fritz would hear from Hodel. Hulett Dep. (May 15, 1996) at 33-34, II App. 1225-26; Hulett Dep. (June 24, 1997) at 30, II App. 1247; *see* Everette Dep. at 97-100, II App. 1005-08.

172. Some DOI officials thought that Hulett was working for Interior during that time period because of his pervasive presence there. DeRocco Dep. at 52, II App. 993; Niedernhofer Dep. at 42- 43, III App. 1422-23.

173. Hodel's instructions to withhold the decision came to Fritz in a special blue envelope, which signified that it was an expedited memorandum, "a hand carry from the Secretary's office." Hulett Dep. (June 26, 1997) at 26, II App. 1246; Fritz Dep. at 160-164 II App. 1103-07.

174. Secretary Hodel's extraordinary instructions were the first departure from the orderly deliberative process envisioned by Fritz for the Appeal, and marked Fritz' final involvement with it. Fritz Dep. at 180, II App. 1116. Hodel's July 17,1985 memorandum to Fritz stayed the Appeal. Def.'s Resp. to Pl.'s Req. for Admiss. No. 103, III App. 1717.

175. Secretary Hodel had signed the memorandum Peabody drafted, which was dated and retyped on "personal" Secretarial letterhead by an unknown person in a form not conforming to basic Interior policy and "recorded after the fact" with no prior Departmental review—all in stark contrast to usual procedures.

Niedernhofer Dep. at 78-80, III App. 1426-28. "It just–it doesn't look right." *Id.* at 80, III App. 1428. Wilkinson-Flavin Dep. at 76-82, III App. 1643-49; Fritz Dep. at 177, II App. 1115; Burch Dep. at 137-38, II App. 955-56; Crosby Dep. at 53-55, II App. 968-70; Everette Dep. at 64-65, II App. 1003-04; Saunders Dep. at 61-62, III App. 1525-26; Vollmann Dep. (Sept. 21, 1995) at 155, III App. 1616.

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182. Peabody was notified immediately by an unknown Interior official that the decision to affirm the 20% royalty rate had been suppressed. Memorandum from E.L. Sullivan to F.L. Barkofske 1 (July 22, 1985), I App. 595. Peabody immediately notified Edison and SRP of that success. Memorandum from RMB [Bertholf] to HFH [Huettemeyer] (July 26, 1985), I App. 614 (concerning Edison); Bertholf Dep. at 46, II App. 896; *see* Leisse Dep. at 133, III App. 1324.

183. SRP immediately dropped its congressional intercession strategy, Rapaport Dep. at 33-34, III App. 1462-63, although Fritz is "sure" that there were congressional inquiries into the matter, Fritz Dep. at 204-05, II App. 1125-26.

184. In issuing his memorandum to Fritz, Secretary Hodel "assume[d] personal jurisdiction" over the appeal. Fritz Dep. at 155-56, 166-67, II App. 1100-01, 1109-10.

185. Hodel's July 17, 1985 memorandum governed the Department for the next two and one-half years; they were considered "march or die" orders. Ryan Dep. at 75-80, III App. 1486-91; Field Dep. at 138, II App. 1038; Fritz Dep. at 163-64, II App. 1106-07; Memorandum from Frank Ryan, Deputy to the Assistant

Secretary–Indian Affairs (Operations), to Joe Johnston, Chief, Division of Energy and Mineral Resource (May 7, 1987), I App. 633; Memorandum from Joe [Johnston] to Frank [Ryan] (May14, 1987), I App. 634.

* * * * *

187. On July 19, 1985, under the mistaken belief that the formal appeal procedures were still in effect, Chairman Zah responded to Farrand's July 5, 1985 letter to Secretary Hodel. Letter from Peterson Zah, Chairman, Navajo Tribal Council, to Honorable Donald P. Hodel, Secretary of Interior (July 19, 1985), I App. 615. Zah stated that negotiations had stalled nine months previously and again urged that a decision on the Appeal be made "as soon as possible." *Id.* at 2, I App. 616.

188. Solicitor Richardson had left the Department shortly after Secretary Clark, and Marian Horn took over as Acting Solicitor and Principal Deputy Solicitor in June of 1985. Horn Dep. at 6, II App. 1160.

189. Vollmann was assigned to respond to Zah's letter. "Tasking Profile" received July 23, 1985, I App. 617; Vollmann Dep. (Sept. 21, 1995) at 160-63, III App. 1621-24.

190. Vollmann learned of Hodel's instructions to Fritz, which caused him to be "uncomfortable." Vollman Dep. (Sept. 21, 1995) at 164, III App. 1625.

191. Vollmann wrote to his superior Horn and sought an opportunity to brief Secretary Hodel about the conflict between Hodel's instructions and the interests of the Navajo Nation. Memorandum from Tim Vollman, Associate Solicitor–Indian Affairs, Principal Deputy Solicitor (July 26, 1985), I App. 618;

see Vollmann Dep. (June 10, 1997) at 11-12, III App. 1588-89.

192. Vollmann's memorandum to Horn recites that Secretary Hodel "instructed the Deputy Assistant Secretary–Indian Affairs to refrain from issuing a decision in this appeal[.]" Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985), I App. 618. In addition, Vollmann noted there that, if the Navajo Nation learned of Hodel's actions, it would likely transfer the Appeal to the Interior Board of Indian Appeals pursuant to 25 C.F.R. § 2.19, which would require the Secretary to assume jurisdiction over it publicly. *Id.* "This would likely result in a lawsuit by the Navajo Nation" or, "[a]t a minimum, [Hodel] would be subject to a deposition." *Id.*

193. Because Vollman did not know then that Peabody's lawyers had drafted Secretary Hodel's memorandum to Fritz, Vollmann Dep. (June 10, 1997) at 12-13, III App. 1589-90, Vollmann included the following comment in his memorandum to Horn:

> The Secretary's action may be challenged on the issue of ex parte contact if he has been in communication with Peabody and failure to provide the tribe the due process protections afforded by the administrative appeal process.

Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985) I App. 618.

194. Kelley drafted Vollmann's memorandum to Horn. *Id.* at 2, I App. 619; Kelley Dep. at 82-84, II App. 1288-90.

195. Vollman's memorandum sought Horn's prompt consideration of the concerns stated there because of the "sensitive nature of this appeal," Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor (July 26, 1985), I App. 618, by which Vollmann meant the threat of litigation, Vollmann Dep. (Sept. 21, 1995) at 168, III App. 1626.

196. A briefing and a meeting with Secretary Hodel were scheduled. Memorandum from Tim Vollmann, Associate Solicitor–Indian Affairs, to Principal Deputy Solicitor at post-it marginalia (July 26, 1985), I App. 620, 621 ("No memo but include in briefing 4 pm by Tim" and "Tim, for your meeting w/the Secretary. Whit [Field]."); *see* Horn Dep. at 52-56, II App. 1161-65; Vollmann Dep. (Sept. 21, 1995) at 169-70, III App. 1627-28.

197. The only recollection stated of either the scheduled briefing of Horn or the meeting with Secretary Hodel is that of Vollmann, who testified as follows:

> All I remember regarding any response to my memo to the principal deputy solicitor was a very brief conversation that I had with Marian Horn, and I can't remember the substance of that conversation. It was–it may have been no more than a few sentences, and I can't remember if she said she was going to talk to the Secretary or what. My best recollection is that she said she would talk to the Secretary, but, frankly, I can't really recall.

Vollmann Dep. (June 10, 1997) at 13, III App. 1590. Others recall nothing of these meetings. *E.g.*, Hodel Dep. at 161-62, II App. 1154-55; Horn Dep. at 52-56, II App. 1161-65; Kelley Dep. at 93-94, II App. 1291-92; Field Dep. at 123-24, II App. 1031-32.

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199. About a month after expressing his serious concerns about Secretary Hodel's actions and requesting Horn's early review "[b]ecause of the sensitive nature of this appeal," Vollmann responded to Zah's letter of July 19, 1985 to Hodel. Letter from Tim Vollmann, Associate Solicitor, Division of Indian Affairs, to Peterson Zah, Chairman, Navajo Tribal Council, *et al.* (Aug. 29, 1985), I App. 622.

200. Kelley drafted that letter, also. *Id.* at 2; Kelley Dep. at 96-98, II App. 1293-95.

201. The body of that letter states, in its entirety:

> The Secretary has received your letters dated July 19, July 5, and July 11, 1985, and has asked me to respond. Your letters concern an appeal filed by Peabody of the Navajo Area Director's decision adjusting the royalty rate on a Navajo coal lease with Peabody.
>
> As you are aware, the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary –Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized. You of course will be informed when that decision is made.

Id. at 1, I App. 622.

202. In drafting that letter, Kelley carefully avoided informing the Navajo Nation about Secretary Hodel's instructions. Kelley Dep. at 123, II App. 1299. DOI tried to answer Zah's letter "without saying anything." *Id.* at 127, II App. 1300.

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204. Kelley, the drafter of that letter, testified that "if I was in the Navajo Nation's feet with that amount of information, yeah, I'd be upset; I'd be outraged." Kelley Dep. at 152-53, II App. 1307-08.

205. Vollmann himself opined that his August 29, 1985 letter to Zah violated the trustee's duty of candor to the Navajo Nation. Vollmann Dep. (Sept. 21, 1995) at 190-91, III App. 1633-34.

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207. Peabody, SRP and Edison were fully informed of all the details of the Secretary's actions, however. *E.g.*, Memorandum from E.L. Sullivan to F.L. Barkofske (July 22, 1985), I App. 595; Memorandum from RMB [Bertholf] to HFH [Huettemeyer] (July 26, 1985), I App. 614.

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213. In the words of Frank Ryan, the head of BIA's Office of Trust Responsibilities:

> the message [of Hodel's instructions] was, we're not going to decide anything around here until you guys negotiate an answer that Peabody's going to like and that you [the Navajo Nation] can live with. It seemed to me that that was what the message was. Ryan Dep. at 148, III that App. 1514.

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220. Zah had campaigned in 1982 on a platform that emphasized the need to obtain equitable coal royalties. Zah Dep. at 25-27, III App. 1676-78. However, Zah had been unable to achieve anything greater than $37^{1/2}$¢ per ton for the 8580 Coal. *See supra* ¶¶ 217-218.

221. Zah was narrowly defeated by former Chairman MacDonald in the 1986 election although MacDonald had been investigated and prosecuted for various corrupt practices. Zah Dep. at 25-28, 62, III App. 1676-79, 1683; Back Dep. at 15-16, II App. 864-65.

222. MacDonald told Peabody that he wanted to wrap up negotiations with Peabody "as soon as possible." Kenneth R. Moore, Kenmor Resource Consultants, Inc., Draft "Letter/Report on Amended Leases: The Navajo Nation v. The United States of America" 7 (Sept. 28, 1994), I App. 781.

223. At the request of the Navajo Nation, Wilson Barber, who succeeded Donald Dodge as BIA's Navajo Area Director, inquired of Frank Ryan, the Deputy Assistant Secretary (Trust and Economic Development), as to the status of the Appeal. Barber Dep. at 5, 24-25, II App. 873, 874-75.

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226. Contemporaneous notes emphasize that Barber would not be told of the true status of the Appeal unless Whit Field authorized it. Those notes state:

– Ltr. to Wilson [Barber] including status (above) ***"NOT"* WITHOUT WHIT'S APPROVAL**

Memorandum from Frank Ryan to Joe Johnston at marginalia (May 7, 1987), I App. 633 (emphasis in original).

227. Barber was refused a status report on the issue of the Appeal, the only time that this happened in his career concerning a matter within his area of responsibility. Barber Dep. at 25, II App. 875.

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229. Pfister presented the deal to SRP's Board of Directors on September 14, 1987, stating that "the utility had been prepared to pay more." Guy Webster, "SRP home-electricity rates to rise 5.9%," *Arizona Republic*, Sept. 15, 1987 at F5, F7, I App. 641-42. Simultaneously, SRP raised its rates by 5.9%—$43.5 million per year–to pay for new corporate headquarters, a power plant expansion and increased operating cost. *Id.*

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232. Peabody had contractually agreed to deliver 424 million tons of coal from its Black Mesa leases, but had rights to only 400 million tons there; the negotiated amendments allowed Peabody to mine 90 million more tons under the 8580 Lease. Moore Dep. (May 29, 1996) at 54, III App. 1388; Huettemeyer Dep. at 123, II App. 1189; Amendments to Coal Mining Lease No. 14-20-0603-8580 Between the Navajo Tribe and Peabody Coal Company 1-2 (executed Nov. 20, 1987) ("8580 Amendments"), I App. 643.

233. The total of 400 million tons in the Black Mesa leases was insufficient to meet the 35 year life requirements of NGS and Mohave. Moore Dep. at 53-54, III App. 1387-88. The additional coal secured through the amendments to the 8580 Lease alone extended the economic life of both NGS and Mohave by about eight years. *See* Huettemeyer Dep. at 128, II App. 1191; Smith Dep. at 67, III App. 1535.

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237. Peabody and Edison faced "unrestricted Navajo tax increases" in future years. R.M. Bertholf, Dis-

cussion Summary–Indian Lease Negotiations 1 (n.d.) ("Discussion Summary"), I App. 637; *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (upholding Navajo tax laws); *Commonwealth Edison Co.* v. *Montana*, 453 U.S 609 (1981) (upholding . . . coal severance tax of up to 30% of the contract sales price). The Navajo Nation effectively capped its taxes at 8%. 8580 Amendments at 18, I App. 60; Discussion Summary at 1, I App. 660, Discussion Summary at 1, App. 637.

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248. The Navajo Nation requested BIA review of the 8580 Amendments in a letter to Barber dated September 16, 1987. Letter from Michael P. Upshaw, Attorney General, Navajo Nation, to Wilson Barber, Area Director, BIA (Sept. 16, 1987), I App. 687 ("We hereby request the Bureau of Indian Affairs to initiate its technical review of these documents for the approval of the Secretary of the Interior."); Barber Dep. at 28, II App. 877.

249. The Navajo Area Office, still in the dark about Hodel's instructions, invoked normal procedures and requested E&M to review the lease amendments. Memorandum from Assistant Area Director, Navajo, to Division of Energy & Minerals Resources (Sept. 23, 1987), I App. 688. The Area Office specifically requested E&M to

> review the amendments and provide the Navajo Area Minerals Section with your comments[,] recommendations and/or your concurrence and other requirements or stipulations that would improve the amendment economically and environmentally in the best interest of the Navajo Nation.

Id.

250. The Area Office made that request to determine if the Navajo Nation was receiving the maximum benefit for its nonrenewable resource. Barber Dep. at 29, II App. 878.

251. The Navajo Area Office did not receive a response to that request. Barber Dep. at 30, II App. 879; Field Dep. at 143, II App. 1039.

252. The usual meaningful review requested by the Navajo Area Office was not to happen because the approval process had degenerated into a rubber-stamping exercise: "The way this happened was, we were rubber stamping a bunch of amendments that we weren't supposed to review . . . ." Ryan Dep. at 132, III App. 1505.

253. As Ryan testified, "The bottom line on this whole thing is just a confirmation, a sprinkling of holy water on this agreement that the Navajo and the energy company came up with." *Id.* at 128, III App. 1504.

254. Field "assisted Peabody in shepherding the amended leases through the Department in late 1987 and early 1988 for Secretarial approval." Memorandum from E.L. Sullivan, Peabody, to D.L. Stevenson, Peabody (June 5, 1989), I App. 771; Sullivan Dep. at 127, III App. 1567.

255. Field assigned the legal review of perhaps the largest Indian mineral transaction in history to an inexperienced Edwin Winstead, the newest member of the Solicitor's Office at the time. Winstead Dep. at 14-17, 170 ("I was probably the only one with time because I had just started and everybody else was going nuts, so it made sense to give it to me, I'm sure."), III App. 1655-58, 1671.

256. Winstead had no significant experience in mineral royalty or economic issues, Indian law, trust law, mineral negotiations or mineral leasing. *Id.* at 14-17, 22-23, 175, III App. 1655-58, 1659-60, 1672. This was "one of his first assignments." Field Dep. at 144, II App. 1040.

257. Winstead was vaguely aware that an appeal related to Peabody was pending, but he "really didn't have the time at that point [late 1987] in trying to get the review done in the time frame that everybody wanted it done and to try to find other documents." Winstead Dep. at 37, III App. 1663.

258. Winstead saw his job as "just flagg[ing] the major legal issues." *Id.* at 24, III App. 1661.

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260. Field did not tell Winstead that a decision had been drafted for Fritz' signature that would have affirmed the 20% royalty rate as final for the Department. *Id.* at 75, III App. 1664.

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262. Winstead's first memorandum observed that the lease amendments violated three regulations, including one governing the conduct of negotiations. Memorandum from Edwin Winstead, DOI, to Whit Field, DOI 2 (Nov. 3, 1987), I App. 690 (discussing, *inter alia*, 25 C.F.R. § 211.2).

263. These regulations are intended to benefit and protect Indian tribes. Winstead Dep. at 110, III App. 1665.

264. The record is devoid of any advance written permission to negotiate granted by the Department to the Navajo Nation, contrary to the regulations.

Aubertin Dep. Vol. II at 11, 72-73, II App. 830, 861-62; Ryan Dep. at 145-46, III App. 1511-12; Swimmer Dep. at 119, III App. 1578; Hughes Dep. at 164, II App. 1211.

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267. On November 24, 1987, the Navajo Area Office recommended approval of the lease amendments "based on the information we have." Memorandum from Assistant Area Director, Navajo, to Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) (Nov. 24, 1987), I App. 692.

268. This recommendation was based on the belief that "the BIA office at Lakewood, Colorado [E&M] submitted comments based on an in depth technical review of both lease amendments." *Id.*

269. In fact, no such review had been done. Aubertin Dep., Vol. I at 164-65, II App. 820-21.

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271. Thus, Peabody submitted the lease amendments directly to Secretary Hodel's office, as Field's chronology states. Memorandum from Assistant Solicitor, Branch of Land & Minerals, DOI, to Deputy Solicitors, DOI 2 (Dec. 9, 1987), I App. 694 (Nov. 27, 1987 entry states "Advised by Secretary's Office amendments had been submitted by Peabody"); *see* Farrand Dep. at 80, II App. 1021.

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275. Indeed, the Navajo Nation had raised royalty rates 12½% on other leases that did *not* have any reopener or royalty adjustment feature unlike the 8580 lease. Huettemeyer Dep. at 78, II App. 1180 (Utah International lease royalties raised without adjustment

feature); Zaman Dep. at 12, 71-72, III App. 1694, 1699-700.

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277. No economic analysis of the Peabody lease amendments–indeed, not even a comparison of those amendments to the 20% royalty rate that all Departmental studies had concluded was reasonable and appropriate–was ever done. Aubertin Dep. Vol. I at 102, 164-65, II App. 804, 820-21; *see* Swimmer Dep. at 122-23, III App. 1579-80; Rai Dep. at 111, III App. 1458 (no one disagreed with propriety of 20% royalty rate).

278. The merits of the transaction were simply irrelevant to high-level DOI officials. Ryan Dep. at 127-28, 132, III App. 1503-04, 1505.

279. Late in the afternoon on Thursday, November 26, 1987, Johnston told E&M Assistant Chief Don Aubertin to perform a "technical review" of the lease amendments. Aubertin Dep. Vol. I at 130-33, II App. 807-10.

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281. Aubertin's assignment was "[t]o review . . . the negotiated amendments and provide our views on it as–how we felt about that, as acceptable or non-acceptable or whatever." *Id.* at 139, II App. 811.

282. Aubertin was told to have his "technical review" in Washington by the following Tuesday, December 1, 1987. *Id.* at 132, II App. 809.

283. Aubertin was given an unreasonably short period to do any technical analysis of the lease amendments, given the magnitude of the work that should have been done. *Id.* at 130, 139, II App. 807, 811;

id. Vol. II at 42, II App. 844; Swimmer Dep. at 157-58, III App. 1584-85.

284. Because of the unreasonably short deadline, Aubertin:

(a) did not do an economic analysis of the amended lease terms. Aubertin Dep. at Vol. II at 42-43, II App. 844-45.

(b) did not calculate the present value of lease revenues to the Tribe or employ discounted cash flow methods of analysis. *Id.* at 41-42, III App. 843-44; Swimmer Dep. at 123, III App. 1580.

(c) did not determine whether the *in futuro* payments for the new coal rights reflected fair market value. Aubertin Dep. Vol. II at 21-22, 44, II App. 833-34, 846.

(d) did not analyze the economic impact of a tax waiver provision that applied to 90 million tons of coal. *Id.* at 67-68, II App. 859-60.

(e) did not analyze the market for coal under the 8580 Lease. *Id.* Vol. I at 77-78, II App. 797-98.

(f) made errors in mathematical calculations. *Id.* Vol. II at 60-61, II App. 855-56.

(g) did not have basic reference materials needed for his review. *Id.* at 46, II App. 848.

(h) received no staff support. *Id.* at 44, III App. 846.

See Johnston Dep. at 119-30, II App. 1258-69 (E&M was not requested to analyze various factors; BOM should have been asked to do so but was not).

* * * * *

286. The Secretary's right to adjust the royalty rate periodically, as in the original 8580 Lease, was "extremely valuable" to the Navajo Nation. *Id.*, Vol. II at 23-24, II App. 835-36.

287. Aubertin acknowledged that the coal under the 8580 Lease is in a well-established field with infrastructure in place, that the coal is good coal ("compliance" coal under EPA regulations), that the markets for the coal are both well-established and captive, that there is not a lot of overburden, and that there is a fairly low strip ratio–all of which would support a significant royalty to the Navajo Nation. *Id.*, Vol. I at 97-101, II App. 799-803.

288. Aubertin observed that the Hopi Tribe, which had no ability to adjust the royalty rate under its lease, had obtained better results in their negotiations than the Navajo did–even ignoring the $88 million in back taxes and royalties that the Navajo Nation relinquished and the Hopi Tribe did not. *Id.*, Vol. II at 60, 64-65, II App. 855, 857-58; *accord* Smith Dep. at 137-38, III App. 1547-48.

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294. Aubertin did not know if or to what extent the Navajo Nation waived back taxes in order to get the federal minimum royalty rate even though he recognized the importance of that information for review of the 8580 Amendments. *Id.* at 159, II App. 818 ("Well, it would have been obviously good to know.").

295. Such economic negatives were "never brought to [Aubertin's] attention." *Id.* at 162, II App. 819.

296. No other "technical review" was performed in reviewing the 8580 Amendments. *Id.* at 128, II App. 806.

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298. Aubertin then recommended approval of the 8580 Amendments based on additional erroneous assumptions that the combined royalty and tax receipts by the Navajo Nation would equal 20.5% for the 8580 Lease, which he incorrectly believed was coextensive with the Kayenta Mine. Aubertin Dep. Vol. I at 167-68, II App. 822-23, *id.*, Vol. II at 50, II App. 852.

299. Aubertin's assumption is erroneous; because of the tax waiver for Peabody coal used at NGS, the total of royalties and taxes received by the Navajo Nation on that coal cannot exceed 12½%. Shirley Decl., III App. 1816.

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301. Aubertin would not have recommended approval of the lease amendments if he had known that the Navajo nation would obtain only 12½% for its coal mined at Peabody's Kayenta Mine. Aubertin Dep. Vol. II at 51, II App. 853.

302. Aubertin's opinion is that a 12½% royalty rate for that coal would not be in the best interest of the Navajo Nation. *Id.* at 52, II App. 854.

303. Aubertin dutifully faxed his hurried and mistake-ridden "technical review" to Washington at 6:36 a.m. on Wednesday, December 2, 1987. Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and

Economic Development) (Dec. 2, 1987), I App. 700; Aubertin Dep. Vol. I at 132, II App. 809.

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307. The Solicitor's Office finished its legal review on December 1, 1987. Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs (Dec. 1, 1987), I App. 715.

308. The Acting Associate Solicitor's review "was not intended to cover economic issues." Hughes Dep. at 101, II App. 1198.

309. The first paragraph of the Acting Associate Solicitor's memorandum states, in part: "We submit the following analysis without having received BIA's NEPA and economic analyses. We will supplement this document after we have received and analyzed those documents." Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs 1 (Dec. 1, 1987), I App. 715.

310. No economic analysis concerning this matter was received by the Solicitor's office for comment. *Id.*

311. Thus, no supplement to that memorandum was prepared. Hughes Dep. at 104, II App. 1199.

312. Field did not inform Hughes that a decision document had been drafted that would have upheld the 20% royalty rate. *Id.* at 117, II App. 1200.

* * * * *

314. The Acting Associate Solicitor was "not able to determine how or if" a provision signifying a non-standard method of calculating the royalty "may affect the Tribes." Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian

Affairs 2-3 (Dec. 1, 1987), I App. 716-17. The memorandum continues, "[i]n any case, this is primarily an economic issue which should be examined in the Bureau of Indian Affairs economic analysis." *Id.* at 3.

315. This method of calculating royalties resulted in royalty payments lower than the minimum allowable for federal coal. *See* Bertholf Dep. at 93-94, II App. 902-03.

316. That issue was not addressed in the BIA's "technical review." *See* Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), I App. 700.

317. The Solicitor's office expected a conversational approach with BIA to assure that such issues were addressed by DOI. Hughes Dep. at 147-50, II App. 1205-08.

318. Acting Associate Solicitor Hughes expected that BIA's economic analysis would quantify a proper bonus for the additional coal dedicated to Peabody in the lease amendments, the consequences of the enormous tribal tax issues, and expected costs associated with the replacement of periodic Secretarial royalty adjustments with an arbitration scheme not involving the United States as trustee. *Id.* at 150, 153, 171-73, II App. 1208, 1209, 1212-14.

319. Aubertin's "technical review" did not address these matters. Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), I App. 700.

320. The Acting Associate Solicitor's memorandum discusses the provisions related to Navajo taxes, with no attempt to quantify the losses to the Navajo Nation. Memorandum from Acting Associate Solicitor, Indian Affairs, to Assistant Secretary–Indian Affairs, App. I at 23-24 (Dec. 1, 1987), I App. 747-48.

321. Without knowledge of those provisions, Aubertin's "technical review" included the following:

> Tribal Taxation
>
> No Comment.

Memorandum from Assistant Chief, Branch of Energy and Mineral Resources, BIA, to Frank A. Ryan, Deputy Assistant Secretary–Indian Affairs (Trust and Economic Development) (Dec. 2, 1987), attachment at 3, I App. 705; *see* Ryan Dep. at 132, III App. 1505 ("The trust people thought that that should be handled by the Solicitor's people.")

322. The lease amendment approval package went to Ryan for his review and recommendation. Ryan Dep. at 119-20, III App. 1498-99.

323. Ryan reviewed the amendments, and "thought some of them were–were wrong." *Id.* at 120-22, 125, III App. 1499-1501, 1502.

324. A memorandum recommending approval of the lease amendments was drafted for Ryan's signature. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759.

325. Ryan refused to sign it.

> A. Oh, yes. This is bringing this back. This is–this is out of my shop. I just remembered something. I remember, I saw this memo. This came to me, and I didn't sign it. I refused to sign it.
>
> Q. That's interesting. And your reasons for refusing to sign that?
>
> A. I knew–well, I thought that I would be participating in a breach of trust, and I thought the only honorable thing to do when you work someplace that you feel like you have to do that is to resign. And that's what I had done.

Ryan Dep. at 141, III App. 1510.

326. Ryan tied the breach of trust directly to the violation of the regulation governing the conduct of negotiations and to Secretary Hodel's intervention. *Id.* at 146-48, III App. 1512-14.

327. Shirley Crosby was an administrative employee in the Bureau of Indian Affairs with no training or expertise in mineral leasing, mine economics or mineral negotiations. Def.'s Resp. to Pl.'s Req. for Admiss. No. 104, III App. 1718; Fritz Dep. at 198-99, II App. 1121-22; Crosby Dep. at 15-16, II App. 963-64 (Determining royalty rates was strictly out of my bail[i]wick."); *id.* at 37, II App. 967 ("I don't know anything about royalties.").

328. Ryan having refused to sign the recommendation, Crosby did. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759.

* * * * *

330. Crosby testified that she would not have signed the recommendation if she had known Ryan's position. Crosby Dep. at 76-77, II App. 975-76.

331. The package forwarded to Assistant Secretary Swimmer and later to Secretary Hodel did not include Aubertin's "technical review" or any other economic analysis. Memorandum from Deputy to the Assistant Secretary–Indian Affairs (Trust and Economic Development) to Assistant Secretary–Indian Affairs (Dec. 9, 1987), I App. 759; Swimmer Dep. at 134-35, III App. 1581-82; Field Dep. at 190, II App. 1046; Hughes Dep. at 139-40, II App. 1202-03; Crosby Dep. at 74-76, II App. 973-75; *see* Fritz Dep. 199-200, II App. 1122-23 ("The least they could have done was bring forth the analysis that had been done previously as part of the process that we had in 1985."); Memorandum from Assistant Secretary–Indian Affairs to Secretary (Dec. 9, 1987), I App. 760; Hughes Dep. at 139-40, II App. 1202-03.

332. Swimmer did not even ask for a comparison of the economic package that was negotiated versus simply plugging in a 20% rate into Article VI of the original 8580 Lease. Swimmer Dep. at 138, III App. 1583.

333. Peabody meanwhile continued to lobby Interior officials *ex parte*. *E.g.*, Memorandum from PMB [Bertholf] to CGT [Thompson] (Dec. 1, 1987) at marginalia, I App. 699 (note dated 12/4 reads: "Wed 12/9 latest anticipated 'Hodel execution' date per Peabody"); *see* Bertholf Dep. at 89, II App. 901; Farrand Dep. at 86, II App. 1027; Memorandum from Assistant Solicitor, Branch of Land & Minerals, DOI, to Deputy Solicitor,

DOI 2 (Dec. 9, 1987), I App. 694 (December 9, 1987 entry in Field's chronology reads "Discussed language in proposed Secretarial Approval with Farrand and are very close to a consensus.").

334. In a memorandum drafted in part by Field, Assistant Secretary Swimmer recommended to Secretary Hodel that he approve the lease amendments. Memorandum from Assistant Secretary–Indian Affairs to Secretary (Dec. 9, 1987), I App. 760.

335. Peabody assisted in the drafting of that memorandum. Def.'s Resp. to Pl.'s Req. for Admiss. No. 112, III App. 1722.

336. Swimmer justified his recommendation by the assertion "that the parties have negotiated at arm's length, in good faith to reach these agreements," the same justification that the Department had offered 22 years earlier for the original unconscionable deal. *Compare* Memorandum from Assistant Secretary–Indian Affairs to Secretary 1 (Dec. 9, 1987), I App. 760, *with* Letter from Richard F. Allan, Associate Solicitor, Indian Affairs, to Reed Moyer, Associate Professor, Michigan State University 1 (Oct. 19, 1965), I App. 166.

337. The Department officials in charge of trust responsibilities recognized throughout that the Navajo Nation could not bargain on an equal footing with Peabody. Fritz Dep. at 219-20, II App. 1127-28; Ryan Dep. at 156-61, III App. 1516-22.

* * * * *

339. After a scheduled meeting with Peabody executives on December 8, 1987, arranged by the National Coal Association, *see* Memorandum from E.L. Sullivan to H.W. Williams (Dec. 1, 1987), III App. 1822-24, Sec-

retary Hodel formally approved the lease amendments on December 14, 1987. Secretarial Approval (Dec. 14, 1987), I App. 764.

* * * * *

341. Peabody drafted parts of the Secretarial Approval document. Resp. to Req. for Admiss. No. 111, III App. 1721; Notes entitled "Dictated from Chris Farrand" (Dec. 9, 1987), I App. 766.

* * * * *

343. Secretary Hodel approved amendments that eliminated the trustee's ability to adjust the royalty rate. 8580 Amendments at 8, I App. 650 (deleting Article VI of the 8580 Lease).

344. The 8580 Lease had contemplated this abrogation of the trustee's authority only "in the event of termination of federal jurisdiction." 8580 Lease at 7, I App. 649.

345. That phrase was remnant of the discredited and congressionally-abandoned "termination" era of federal/Indian relations. Fritz Dep. at 54, II App. 1062.

* * * * *

347. The United States has never relinquished its ability to adjust royalty rates for federal, as opposed to Indian, coal. Hodel Dep. at 88-89, II App. 1146-47.

348. Pursuant to the lease amendments, on December 18, 1987, the Acting Assistant Secretary–Indian Affairs vacated the Area Director's adjustment of the royalty rate. Letter from W.P. Ragsdale, Acting Assistant Secretary–Indian Affairs, to Gregory J.

Leisse, Peabody Coal Company, *et al.* (Dec. 18, 1987), I App. 767.

349. Three days later, SRP–which had estimated an adverse impact of $347 million for just the Arizona consumers of NGS of the 20% royalty rate compared to the federal minimum–determined that "the impact of the approval of the new lease amendments should be negligible." Memorandum from Darrell E. Smith, Director, Resource Planning, SRP, to A. J. Pfister, General Manager, SRP (Dec. 21, 1987), I App. 770.

350. Summaries prepared by Edison's management for Edison's upper management show, among other things, that the Navajo Nation lost at least $89,000,000 in back taxes and royalties immediately upon Hodel's approval of lease amendments. "Cost-Benefits," I App. 636; "Discussion Summary," I App. 637; *see* Bertholf Dep. at 66-67, II App. 897-98.

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* * * * *

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX
(VOLUME II)

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PETITION FOR WRIT OF CERTIORARI FILED: MAR. 15, 2002
CERTIORARI GRANTED: JUNE 3, 2002

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MINING LEASE

CONTRACT NO. 14-20-0603-8580

Between

SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

THIS INDENTURE OF LEASE made and entered into sextuplicate effective the 1st day of February, 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor," and the SENTRY ROYALTY COMPANY, a Nevada-corporation with offices at 301 North Memorial Drive, St. Louis, Missouri 63102, herein designated as "Lessee,"

WITNESSETH:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is here acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee a tract of land lying and being within the Navajo Indian Reservation, County of Navajo, State of Arizona, more particularly described in Exhibit "C" attached hereto and containing 24,858 acres.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date hereof, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such land for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks, and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and do sll other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right of ingress and egress; to develop and utilize water for use in its mining operations, provided, however, that at conclusion of mining operation all wells will be left properly cased and that any water not utilized in mining operations shall be made readily available for local Navajo use.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface

that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of the coal reserves in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term a complete report to the Lessor of its past operations accompanied by declaration of the Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven, and application be made by the Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus.

ARTICLE III. DEFINITION: "SUPERINTENDENT"

The term "superintendent" as used herein shall mean the "General Superintendent," Navajo Agency, Window Rock, Arizona.

ARTICLE IV. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the General Superintendent for the use and benefit of the Navajo Tribe as royalties, the sums of money as follows:

A. Twenty-five ($.25) Cents per ton for all coal sold and utilized off the Navajo Reservation, Twenty ($.20) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is less that Four ($4.00) Dollars per ton.

B. Thirty ($.30) Cents per ton for all coal sold and utilized off the Navajo Reservation, Twenty-four ($.24) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is less that Four ($4.00) Dollars per ton but less that Five ($5.00) Dollars per ton.

C. Thirty-seven and one-half ($.37$^{1/2}$) Cents per ton for all coal sold and utilized off the Navajo Reservation, and Thirty ($.30) Cents per ton for all coal sold and utilized on the Navajo Reservation, whenever the average monthly gross realization therefrom is Five ($5.00) Dollars or more per ton.

D. Whenever uranium ores are mind and sold by Lessee, royalty shall be paid at the rate provided for in the "Percentage Royalty Schedule" set out in Resolution of the Advisory Committee of the Navajo Tribal Council (ACS-37-55) dated September 27, 1955, as amended.

E. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid at the rate of Ten (10%) Per Cent of the sales price, f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

For the purpose of this agreement, the term "Average Monthly Gross Realization" shall mean the average price of coal produced under the terms of this lease, f.o.b. Lessee's mine, and shall be determined by dividing the total monies received for the coal sold during a month by the total number of tons sold during such month, but no coal mined hereunder shall be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the monthly Gross Realization.

All royalties accruing for any month shall be due and payable on or before the twenty-fifth of the succeeding month.

ARTICLE V. ANNUAL RENTAL

To pay or cause to be paid to the Navajo Tribe, in advance beginning with the date of approval of this lease as annual rental, One ($1.00) Dollar per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall

not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

If at the termination of the initial five years of this lease, actual mining operations have not commenced, Lessee will pay or cause to be paid to the Navajo Tribe each year in advance for the next five years' remainder of the lease term, Two ($2.00) Dollars per acre per annum in advance for each and every year. Such advance rentals during the second five years of the lease term may be carried forward for a maximum of two additional years and credited against royalties earned during those two years when earned royalties exceed this minimum.

If at the termination of the first ten-year period, actual mining operations have not commenced, Lessor shall have the option of terminating this lease. However, if lease continues beyond the first ten- year period Lessee shall pay Two ($2.00) Dollars per acre per annum in advance for each and every year during the term of the lease, which may be carried forward for two (2) years and be credited against the earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if the Lessee can prove to the satisfaction of Navajo Tribe and the Secretary of the Interior bonafide contracts for the sale of substantial quantities of said coal, the maximum carry forward period may, at the discretion of the Lessor and the Secretary of the Interior, be increased from two years to five years, and advance rental paid at the same rate from the date of such proof until mining actually is commenced may also be credited against earned royalties in subsequent years.

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. In the event of termination of Federal jurisdiction, the royalty provisions shall, in lieu of Secretarial adjustment, be subject to renegotiation between Lessor and Lessee at the times aforesaid, provided that if the parties are unable to agree, such royalty shall be submitted to arbitration.

In the event Federal jurisdiction shall have been terminated and the royalty provisions are subject to negotiation as provided in this section, within ten days after the request of either Lessor or Lessee for submission to arbitration, Lessee shall name one arbitrator and Lessor shall name one arbitrator, and the two named shall select within ten days next ensuing a third arbitrator. In the event the two arbitrators named by the parties cannot agree upon a third arbitrator, then any Judge of a United States District Court for the District of Arizona may select the third arbitrator. In determining the royalty provisions, the arbitrators shall consider all pertinent evidence to establish the value of coal and shall fix a royalty fair to both Lessor and Lessee under the circumstances existing at the time of such arbitration.

ARTICLE VII. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly the premises upon the termination of this lease to the Navajo Tribe or the [illegible], in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by the said Lessee. All Butler, Quonset, Armco and other buildings of like nature and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of the Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Upon the expiration of this lease, Lessee's title to all permanent structural improvements, including the standard gauge railroad track from the leased premises to the nearest railroad if constructed under the provisions of Article XXI of this lease, shall vest in the Lessor.

ARTICLE VIII. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Advisory Committee of the Navajo Tribal Council, authorize the suspension of mining operations for such time as he considers advisable, but this shall not release the Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE IX. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and to furnish the Superintendent, and the Treasurer of said Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all property of the Lessee upon the site, including implements, tools, movable machinery, and upon all other personal chattels used in operation upon said property, and upon all of the unsold minerals obtained from the land herein leased, as security for payment of said sums.

An audit of the Lessee's applicable accounts and books shall be made annually or at such times as may be

directed by the Superintendent by certified public accountants approved by the Secretary of the Interior and at the expense of the Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior through the Superintendent and to the Navajo Tribe within thirty (30) days after the completion of each auditing.

ARTICLE X. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article V above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE XI. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Advisory Committee of the Navajo Tribal Council. If this lease is divided by the assignment of an entire interest or any part of it, each part shall be considered a separate lease incorporating all the terms and conditions of the original lease. Lessee, however, shall

have the right to assign or transfer its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than Fifty (50%) Per Cent interest.

ARTICLE XII. BOND

Lessee agrees to furnish such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XIII. INSPECTION

The leased premises and producing operations, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XIV. DISPOSITION OF SURFACE

Subject to the provisions of Article XXVII, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to the Navajo Tribe and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, power lines, and telephone lines on and across said lands.

ARTICLE XV. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby upon the payment of all rentals, royalties and other obligations due and payable to that date to the Lessor, and the further sum of One ($1.00) Dollar, provided Lessee has complied with Article XXX with respect to reseeding. If this lease has been recorded, Lessee shall file a recorded release with his application to the Superintendent for termination of this lease.

ARTICLE XVI. CANCELLATION AND FORFEITURE

When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XVII. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding

upon, and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVIII. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLES XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this release.

ARTICLE XX. COVENANT TO HOLD HARMLESS

Lessee will hold the Navajo Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XXI. RAILROAD CONSTRUCTION

Provided there is discovered on the premises described in Exhibit "C" attached, 200 million tons of merchantable and economically minable coal, and if Lessee has, or can secure, suitable contracts for the sale of 35 million tons of coal involving rail delivery off the Reservation during a maximum period of twenty years to justify the investment, then Lessee agrees to commence or cause to be commenced and completed with dispatch during the first ten (10) years after the expiration of Lessee's Drilling and Exploration Permit, the construction of a standard gauge railroad track from the leased premises to the nearest railroad approximately 130 miles distant. Lessor agrees to furnish to Lessee or the builder of the railroad, without cost, the necessary rights of way and permits across Navajo Tribal lands.

Lessee agrees that when and if such railroad connection is built, the Navajo Tribe shall have the right, subordinate to the uses necessary and incident to the Lessee's business, to make nonexclusive use thereof for the Tribe's businesses and purposes, excluding the shipment of coal and organic fuels originating on the Reservation, without compensating the Lessee for any part of the cost it may bear of the construction and operation of the railroad connection; provided, however, the Tribe shall pay the lawful tariffs applicable to such uses and shipments as it make thereon; and Lessees or designees of the Tribe shall have an option for the nonexclusive use of such railroad connection upon the condition that said Lessees or designees so using said railroad connection will first pay to the Lessee a reasonable charge therefor, based on the distributive

share, borne by Lessee, of the cost of construction, maintenance and operation of the railroad, and also based on the proportionate use thereof by the respective parties, and provided further that such use does not interfere with the necessary and convenient use by Lessee.

ARTICLE XXII. OBSERVANCE OF TRIBAL RESOLUTIONS

"Lessee agrees to comply with all lawful resolutions adopted by the Navajo Tribal Council."

ARTICLE XXIII. TERMINATION OF FEDERAL TRUST RESPONSIBILITY

Nothing contained in this lease shall operate to delay or prevent the termination of Federal trust responsibility with respect to the land during the term of this lease; however, such termination shall not serve to abrogate this lease. In the event of such termination, all powers, duties or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of this lease shall be assumed by Lessor, his successors or assigns.

ARTICLE XXIV. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that he will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever; that he will not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in

violation of existing laws relating thereto, and that any violation of this clause by Lessee, or with his knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Navajo Tribe, provided that if the sale of liquor become legal this covenant shall be voided.

ARTICLE XXV. REDUCTION OF ANNUAL RENTAL PAYMENTS

To the extent that after mining has started, operations of the Lessee after the initial five-year term, hereunder are, in the opinion of the Secretary of the Interior and the Navajo Tribe, interrupted for more than thirty (30) consecutive days by labor disputes, acts of God, acts of the public enemy, fire or other casualties beyond the control of the Lessee, then annual rental shall be reduced in the same proportion that the time the operations of the Lessee are interrupted bears to one (1) year.

ARTICLE XXVI. RESERVATIONS

The Navajo Tribe may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this subsection shall be included in the oil and gas lease, license or permit granted by Lessor on the leased land, (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities, (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities, and (d) no well may be drilled for

oil or gas at any location which, in the opinion of the Mining Supervisor of the Untied States Geological Survey, or the Mining Engineer of The Navajo Tribe, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated mineral from the land covered by this lease.

ARTICLE XXVII. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, The Navajo Tribe and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum products, and for telephone, telegraph and water lines incident to the operation of such pipelines, across the lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the General Superintendent of the Navajo Agency the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain, at applicant's expense, a ramp, so that loaded vehicles, including Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage

to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If applicant fails to make such relocation within such ninety-day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges or assessments placed upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) (a) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

(b) Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) Any executed duplicate of the undertakings specified in subparagraph (a) and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXVIII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or

sent by registered or certified mail, postage prepaid, or by telegram, to the persons specified below:

To or upon the Tribe:

Chairman
Navajo Tribal Council
Window Rock, Arizona

and

General Superintendent
Navajo Agency, Bureau of Indian Affairs
Window Rock, Arizona

To or upon Sentry Royalty Company:

President or Secretary
Sentry Royalty Company
301 North Memorial Drive
St. Louis, Missouri 63102

Either party may at any time, by written notice to the other, change the designation or address of the person so specified as the one to receive notices hereunder.

ARTICLE XXIX. PROTECTION OF NAVAJO IMPROVEMENTS AND EXISTING MINES

Notwithstanding any other provision of this lease, Lessee's operations hereunder shall be subject to the provisions of Navajo Tribal Council Resolution CJA-18-60, adopted January 22, 1960, entitled "To provide for the compensation of Navajo Indian Claimants of

improvements and customary use rights in areas adversely disposed of by the Navajo Tribe." Lessee shall promptly comply with the terms and conditions of said resolution in cooperation with the Land Investigations Department of the Navajo Tribe.

The Department of Land Investigations of the Navajo Tribe has estimated the damages compensable under the foregoing resolution which will probably result from Lessee's proposed operation under this lease at the sum of $ and receipt of double said sum by the General Superintendent of the Navajo Agency hereby is acknowledged, said monies shall be disbursed as provided in the aforementioned Navajo-Tribal Council Resolution CJA-18-60.

Lessee agrees that it will not sell coal to local reservation markets now being served by existing mines as of the date hereof operated by Navajo Indians, so long as these existing mines continue to service the local reservation markets. Lessee shall now, however, be in any manner restricted from developing new markets or uses for coal upon the reservation.

ARTICLE XXX. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in seeking methods of reseeding areas where strip coal mining activities have been completed and to bear a fair proportionate share of the expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of normal soil conservation practices.

DOCUMENTS TO WHICH THIS LEASE IS SUBORDINATE

No oil and gas leases, mining permits, school sites or other use areas, or rights of way, under permit or lease within the parcel of land described in Exhibit C.

/s/ REB
SENTRY ROYALTY COMPANY

/s/ [Illegible]
Chairman
NAVAJO TRIBAL COUNCIL

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS
Lessor

/s/ By /s/ [Illegible]
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY
Lessee

Attest:

/s/ WILLIAM A. SCHNEIDER
Secretary

By /s/ RALPH E. BAILEY
Vice President

APPROVED AUG 28 1964

/s/ JOHN C. DIBBERN [CONFIDENTIAL]
Assistant AREA DIRECTOR

Per I.O. Letter 1-12-62
(Realty-Minerals)
[7362-61]

PHOTOGRAPHED
INDEXED

#4098
FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259, Off. Records page 413-443
RECORDS OF NAVAJO COUNTY, ARIZONA Inclusive
/s/ Elda R. Probst RECORDER
By _____ DEPUTY

ACKNOWLEDGEMENT OF LESSOR

STATE OF ARIZONA)
SS.
COUNTY OF APACHE)

Before me, a notary public on this 31st day of January, 1964, personally appeared Raymond Nakai, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ [Illegible]
Notary Public

[Seal Omitted]
My commission expires:

My Commission Expires June 29, 1965

ACKNOWLEDGEMENT OF LESSEE

STATE OF MISSOURI)
SS.
CITY OF ST. LOUIS)

On this 27th day of January, 1964, before me appeared Ralph E. Bailey and William A. Schneider, to me personally known, who being by me duly sworn, did say that they are _____ President and _____

Secretary of SENTRY ROYALTY COMPANY (and that the seal affixed to said instrument is the corporate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Ralph E. Bailey and William A. Schneider acknowledges said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

Irma D. Onken
Notary Public

[Seal omitted]
My commission expires:
September 8, 1964

EXHIBIT "C"

Attached to mining lease between Sentry Royalty Company and the Navajo Tribe [eligible] and bounds description of Black Mesa coal mining lease, Kayenta, Arizona

Beginning at a point 6,400.0 ft. North and 11,855.0 ft. East of the Coal Mine
Triangulation station (Lat. 36 32' 44,597" N Long. 110 29' 35.691"W)
thence East 5985.0 ft., thence North 2640.0 ft., thence East 2640.0 ft.,
thence North 2640.0 ft., thence East 1320.0 ft., thence North 2640.0 ft.,
thence East 1320.0 ft., thence North 2640.0 ft., thence East 5280.0 ft.,
thence South 5280.0 ft., thence East 15,840.0 ft., thence North 5280.0 ft.,
thence East 10,550.0 ft., thence South 7920.0 ft., Thence West 5280.0 ft.,
thence South 2640.0 ft., thence West 8765.0 ft., thence South 2640.0 ft.,
thence West 3960.0 ft., thence South 5280.0 ft., thence East 6,600.0 ft.,
thence South 2640.0 ft., thence East 2575.0 ft., thence South 2640.0 ft.,
thence East 18,415.0 ft., thence South 9985.0 ft., thence West 44,750.0 ft.,
thence North 7340.0 ft., thence West 2640.0 ft., thence North 5280.0 ft.,
thence West 5150.0 ft., thence North 10,560.0 ft., to the point of beginning and containing 24,858 acres more or less, all in Navajo County, Arizona.

The above description contains the following sections and partial sections:

T37N R18E:
Sections 28 all, 33 all, 34 all, 35 all, 36 all, S 1/2 32, NE 1/4 32, E 1/2 of SE 1/4 29.

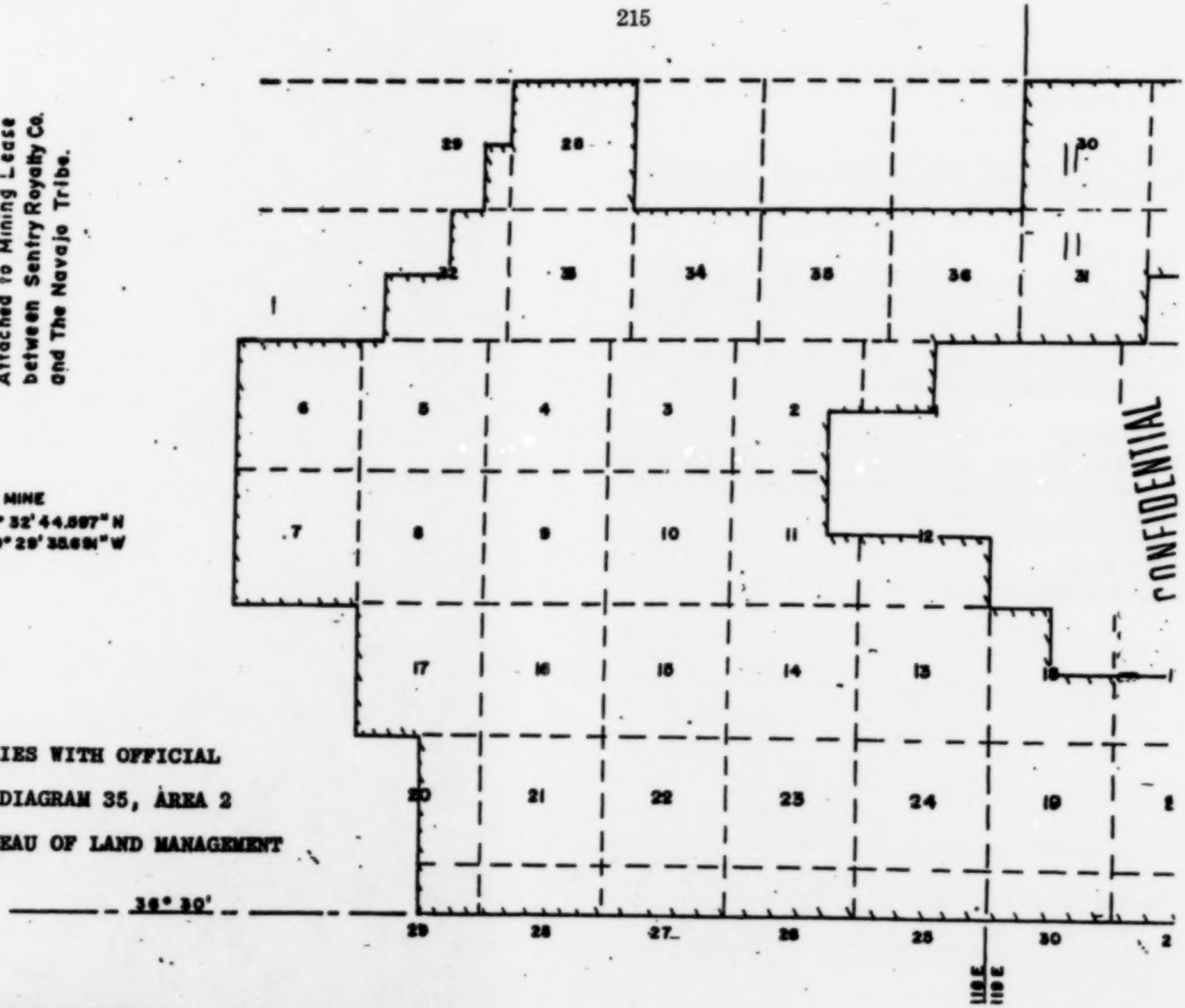
T36N R18E:
All of sections 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 21, 22, 23, 24, NW 1/4 1, N 1/2 and SW 1/4 and W 1/2 of SE 1/4 2, NW 1/4 and W 1/2 of NE 1/4 and S 1/2 11, S 1/2 2 12, E 1/2 20, N 2063.0 ft. of NE 1/4 29, N 2063.0 ft. 28, N 2063.0 ft. 27, N 2063.0 ft. 26, N 2063.0 ft. 25.

T36N R19E:
Sec 19 all, 209 all, 21 all, 22 all, S 1/2 15, S 1/2 16, S 1/2 17, S 1/2 and NW 1/4 18, N 2063.0 ft of 27, N 2063.0 ft. of 28, N 2063.0 ft. 29, N 2063.0 ft. 30.

T37N R 19E:
Sec. 29, 30, 31 all, N 1/2 32.

EXHIBIT C

Attached to Mining Lease
between Sentry Royalty Co.
and The Navajo Tribe.



BEST AVAILABLE COPY

IN WITNESS WHEREOF the parties hereto have caused this Amendment No. I to Mining Lease, to be signed by their duly authorized officers as of the day and year first above written.

THE NAVAJO TRIBE OF INDIANS
Lessor

/s/ By /s/
RAYMOND NAKAI
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY
Lessee

Attest:

/s/ WILLIAM A. SCHNEIDER
Assistant Secretary

By /s/ RALPH E. BAILEY
Vice President

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
ss.
County of Apache)

Before me, a notary public on this 13 day of May, 1964 personally appeared RAYMOND NAKAI, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free

and voluntary act and deed for the uses and purposes therein set forth.

My commission expires: /s/ Walter F. Wolf, Jr.
Jan 6, 1967 Notary Public

ACKNOWLEDGEMENT OF LESSEE

State of Missouri)
ss.
City of St. Louis)

On this 28 day of April, 1960, before me appeared Ralph E. Bailey and William A. Schneider, to me personally known, who being by me duly sworn, did say that they are Vice President and Assistant Secretary of SENTRY ROYALTY COMPANY (and that the seal affixed to said instrument is the corporate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ralph E. Bailey and William A. Schneider acknowledge said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

[Seal Omitted]
My commission expires: /s/ Irma D. Onken
Sept. 3, 1964 Notary Public

GUARANTY

In consideration of the execution of the above lease by the Navajo Tribe, the Peabody Coal Company hereby guarantees the due performance by Sentry Royalty Company of all covenants and agreements on its part therein contained, and the payment of all damages, costs and expenses which by virtue of said contract may become recoverable from said Sentry Royalty Company by the Navajo Tribe.

ATTEST: PEABODY COAL COMPANY

[Seal Omitted] By /s/ [Illegible]
/s/ [Illegible] President
Secretary Title

Amendment No. 1 to Mining Lease Between
Sentry Royalty Company and The Navajo Tribe

THIS AMENDATORY AGREEMENT made and entered into, in sextuplicate effective the 1st day of April , 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor", and the SENTRY ROYALTY COMPANY, a Nevada corporation, with offices at 301 North Memorial Drive, St. Louis, Missouri, 63102, herein designated as "Lessee",

WITNESSETH, That reference is hereby made to that certain Mining Lease between Lessor and Lessee, executed by latter on January 27, 1964, covering 24,858 acres, more or less, in Navajo County, Arizona, and

WHEREAS it is desired by the parties to amend part of Article XXIX of said Mining Lease.

NOW THEREFORE, for and in consideration of One Dollar ($1.00) paid by Lessee to Lessor, and for other valuable considerations, the parties hereto hereby agree as follows:

1. The second paragraph of ARTICLE XXIX PROTECTION OF NAVAJO IMPROVEMENTS AND EXISTING MINES, of said Mining Lease, which reads as follows:

"The Department of Land Investigations of The Navajo Tribe has estimated the damages compensable under the for going resolution which will probably result from Lessee's proposed operation under this lease at the sum of $ and receipt of double said sum by the General Superintendent of The Navajo Agency hereby is acknowledged, said

monies shall be disbursed as provided in the aforementioned Navajo Tribal Council Resolution CJA-18-60."

is hereby deleted, and there is substituted in lieu thereof, a new second paragraph of said Article XXIX, which shall read as follows:

"Because of the continuing nature of the proposed mining operation over many years, and because areas so adversely disposed of will be affected gradually over the years as mining operations progress, Lessee agrees to maintain a minimum balance with the General Superintendent of The Navajo Agency, of Five Thousand Dollars ($5,000), which sum will be replenished from time to time as disbursements are made. Said deposit shall be disbursed as provided in Resolution No. CJA-18-60."

2. Except as herein specifically amended, all the terms, conditions and obligations contained in said Mining Lease shall remain in full force and effect as therein provided.

Contract No. 14-20-0603-9910

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MINING LEASE

Between

SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

State of Arizona

THIS MINING LEASE, made and entered into this 6th day of June, 1966, by and between THE NAVAJO TRIBE OF INDIANS, hereinafter referred to as "Lessor," and SENTRY ROYALTY COMPANY, a Nevada corporation having offices at 301 North Memorial Drive, St. Louis, Missouri, hereinafter referred to as "Lessee,"

WITNESSETH:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee a tract of land, lying and being within the County of Navajo, State of Arizona, more particularly described in Exhibit "D" attached hereto, containing 40,000 acres, more or less.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date of approval by the Secretary of the Interior or his authorized representative, and for so long thereafter as the substances produced are being mined by Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and to do all other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right to ingress and egress; to develop and utilize water obtained from wells located on the leased premises (including water obtained from the wells located on the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964) for use in its mining operations including the transportation by slurry pipeline of coal mined from the leased premises and from the premises covered by said lease dated February 1, 1964; provided, however, that any water

used for such a slurry pipeline shall be obtained from a depth greater than 1,000 feet below the surface and shall be metered and paid for by Lessee at the rate of *$5.00* per acre-foot annually. Any water not utilized in mining operations shall be made readily available for local Navajo use, and at the conclusion of mining operations all wells will be left properly cased. Any water obtained from the wells located on the premises described in Exhibit "D" which is not utilized in mining operations may also be made readily available for local Hopi use.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of coal reserves found in the area covered by this lease in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term, a complete report to Lessor and to the Regional Mining Supervisor, United States Geological Survey, of its past

operations accompanied by declaration of Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven within the leased area and application be made by Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus, under such terms and conditions as may be agreed upon by Lessor and Lessee and approved by the Secretary of the Interior or his authorized representative.

ARTICLE III. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees, subject to the provisions of Article IV-A, to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe, royalties as follows:

A. Six and sixty-seven hundredths percent (6.67%) of the monthly gross realization, but in no event less than twenty-five (25) cents per ton, for all coal obtained from the leased premises which is sold and utilized off the Executive Order Area of December 16, 1882.

B. Five and thirty-three hundredths percent (5.33%) of the monthly gross realization, but in no event less than twenty (20) cents per ton, for all coal obtained from the leased premises which is sold and utilized on the Executive Order Area of December 16, 1882.

The term "gross realization," as used herein, means the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense. No coal mined hereunder shall

be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the gross realization.

C. Whenever uranium ores are mined and sold by Lessee, royalty shall be paid at the rate provided in Exhibit "E" attached hereto and by reference made a part hereof.

D. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid at the rate of ten percent (10%) of the sales price f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

E. During any lease year that earned royalties due the Navajo Tribe exceed the rentals due it for that lease year, the Lessee may credit a maximum of $2,000 per year of such excess earned royalties against the $10,000 advance royalty payment heretofore made to said Navajo Tribe until the entire advance, without interest, has been repaid.

All royalties accruing for any month shall be due and payable on or before the twenth-fifth of the succeeding month.

ARTICLE IV. ANNUAL RENTAL

Lessee agrees, subject to the provisions of Article IV-A, to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe, in advance, beginning with the date of approval of this lease as annual rental,

one ($1.00) dollar per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

At the end of the initial five years of this lease, Lessee, subject to the provisions of Article IV-A, will pay or cause to be paid each year in advance for the balance of the term of the lease, two ($2.00) dollars per acre per annum. Such advance rentals after the first five years of the lease term may be carried forward for a maximum of two additional years and credited against earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if Lessee can prove to the satisfaction of the Navajo Tribe and the Secretary of the Interior, bona fide contracts for the sale of substantial quantities of said coal, the maximum carry forward period, at the discretion of Lessor and the Secretary of the Interior, may be increased from two years to five years.

ARTICLE IV-A. ESCROW PAYMENTS

During the first seven years of this lease or until such earlier date as the interest of The Navajo Tribe in that portion of the Executive Order Area of December 16, 1882, in controversy between the Navajo Tribe and Hopi Tribe, including the leased premises (hereinafter referred to as "leased premises) shall have been finally determined or established by a final judgment in litigation between The Navajo Tribe and the Hopi Tribe

or by a general settlement between The Navajo Tribe and The Hopi Tribe, or by a duly enacted and approved act of Congress, Lessee shall pay one-half of all sums due under Article III ("Royalty Payments") and Article IV ("Annual Rental") into an escrow fund as hereinafter provided. If by the date that Lessee's aforesaid obligation to make payments into said escrow fund ceases, it shall be determined or established by said final judgment or by said general settlement or by said act of Congress that The Navajo Tribe owns or is entitled to an interest greater than a one-half undivided interest in the leased premises, the Secretary of the Interior or his authorized representative shall be promptly paid from said escrow fund for the use and benefit of The Navajo Tribe that portion of said escrow fund that corresponds with and reflects the interest of the Navajo Tribe in said leased area in excess of a one-half undivided interest, and the remaining portion of said escrow fund, if any, shall be promptly paid Lessee.

(For example, if it should be determined by any of the aforesaid methods that the Navajo Tribe owns 100% of the leased area, then the entire escrow fund shall be promptly paid to the Secretary of the Interior or his authorized representative for the use and benefit of The Navajo Tribe. If it should be determined that The Navajo Tribe owns less than 100% of the leased area then that portion of said escrow fund that corresponds with and reflects the interest of The Navajo Tribe in excess of an undivided one-half interest in the leased area, shall be paid as aforesaid.)

If within the seven-year period above specified no such final judgment or general settlement or act of Congress is effected, the entire fund in escrow shall be returned to Lessee at the end of said seven-year period.

Lessor and Lessee shall enter into an escrow agreement with a mutually satisfactory bank containing the foregoing terms and such other terms and conditions as may be appropriate, including authority of the escrow agent to invest the escrow fund. The expenses of the escrow shall first be paid out of any sums earned on said escrow fund and, if such sums are insufficient, said expenses shall be borne equally by Lessor and Lessee.

If within the first seven years of this lease, it shall be determined or established by said final judgment, general settlement or act of Congress that The Navajo Tribe owns or is entitled to an interest greater than an undivided one-half interest in the leased premises, Lessee shall, from and after the effective date of such final judgment, general settlement or act of Congress, pay to the Secretary of the Interior or his duly authorized representative for the use and benefit of The Navajo Tribe, in lieu of the amounts specified in Article III ("Royalty Payments") and Article IV ("Annual Rental"), a percentage of said amounts equal to the percentage of interest of The Navajo Tribe in said Executive Order Area, as determined or established by said litigation, general settlement or act of Congress. If no such final judgment, general settlement or act of Congress is effected within the first seven years of this lease, Lessee shall, commencing with the eighth year of this lease, in lieu of the amounts specified in Article III ("Royalty Payments") and Article IV ("Annual Rental"), pay one-half of said amounts to the Secretary of the Interior or his duly authorized representative for the use and benefit of The Navajo Tribe.

ARTICLE V. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner, and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly to the premises upon the termination of this lease, in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by said Lessee. All Butler, Quonset, Armco, and other buildings of like nature, and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, tracks, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made, and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Lessee shall have no right, title or interest in any such improvements that have not been removed by Lessee within the two-year period after the termination of the lease. It is specifically understood, however, that Lessee may be required to remove any of such improvements within said

two-year period, or respond in damages for failure to do so.

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor, authorize the suspension of mining operations for such time as he considers advisable, but this shall not release Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE VII. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and shall furnish the Secretary of the Interior or his authorized representative, and the Treasurer of the Navajo Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all of the unsold minerals obtained from the land herein leased as security for payment of said sums.

If Sentry wishes to claim any credit against royalties pursuant to Article III, Paragraph B, Sentry shall include in such statements an account of the coal tonnage mined from the leased premises which has

been consumed or utilized on the Executive Order Area of December 16, 1882, during the month reported.

An audit of Lessee's applicable accounts and books shall be made annually or at such times as may be directed by the Secretary of the Interior or his authorized representative by certified public accountants approved by the Secretary of the Interior and at the expense of Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior or his authorized representative and to the Navajo Tribe within thirty (30) days after the completion of each audit.

ARTICLE VIII. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease, without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article IV above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and

the Lessor. If this lease is divided by the assignment of an entire interest, or any part of it, each part shall be considered a separate lease incorporating all the terms and conditions of the original lease. Lessee, however, shall have the right to assign, transfer, or sublease its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than fifty (50) percent interest.

ARTICLE X. BOND

Lessee agrees to furnish the amount of such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts or Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XII. DISPOSITION OF SURFACE

Subject to the provisions of Article XX, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to Lessor and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, power lines, and telephone lines on and across said lands.

ARTICLE XIII. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby in not less than ten-acre parcels, upon the payment of all rentals, royalties, and other obligations due and payable to that date to the Lessor, and the further sum of one ($1.00) dollar, provided Lessee has complied with Article XXIV with respect to reseeding.

If this lease has been recorded, Lessee shall file a recorded release with his application to the Secretary of the Interior or his authorized representative for termination of this lease.

ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and Lessor shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, and Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XV. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon,

and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVI. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

ARTICLE XVIII. COVENANT TO HOLD HARMLESS

Lessee will hold the Navajo Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XIX. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that it will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever. That it will

not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking, or storage of intoxicating liquors or beverages, and that any violation of this clause by Lessee, or with its knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Navajo Tribe.

ARTICLE XX. RESERVATIONS

Lessor may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this Article and Article XXI shall be included in any oil and gas lease, license or permit granted by Lessor on the leased land; (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities; (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities; and (d) no well may be drilled for oil or gas at any location which, in the opinion of the Mining Supervisor of the United States Geological Survey, or the Lessor, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated minerals from the land covered by this lease.

ARTICLE XXI. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, the Lessor and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum

products, and for telephone, telegraph and water lines incident to the operation of such pipelines across the lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the Secretary of the Interior or his authorized representative the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain a ramp, at applicant's expense, so that loaded vehicles, including Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If appli-

cant fails to make such relocation within such 90 day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges, or assessments place upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment, and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property, or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant, or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

B. Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) An executed duplicate of the undertakings specified in Paragraph A, and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXII. LIABILITY FOR DAMAGES

The Lessee shall be liable for any and all damages resulting from operations under this lease, including injury to the Lessor, tenants, licensees and surface owners, and for any and all damages to, or destruction of, all property, including but not limited to crops, vegetation and improvements, caused by Lessee's operations hereunder.

ARTICLE XXIII. EXISTING MINES

Lessee agrees that it will not sell coal to local Reservation markets now being served by existing mines operated by Navajo Indians as of the date hereof, so long as these existing mines continue to service the local Reservation markets. Lessee shall not, however, be in any manner restricted from developing new markets or uses for coal upon the Reservation.

ARTICLE XXIV. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in reseeding areas where strip coal mining activities have been completed and to bear the full expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of accepted soil conservation practices.

ARTICLE XXV. COMMENCEMENT OF MINING

Should the Lessee determine to commence its mining operations under its lease from the Navajo Tribe dated February 1, 1964, north of the premises leased herein, it agrees to bona fide commence mining operation on said premises described herein within two years after the commencement of mining operations on the said lease area of February 1, 1964. Should the Lessee determine to commence its mining operations on the premises described in this lease, then and in that event, it agrees to bona fide commence mining operations upon the area described in the said lease of February 1, 1964, within two years after the commencement of such original mining operations. After mining operations have been commenced in both of said areas Lessee agrees to mine coal on an equal basis from both of said areas insofar as the quality and quantity of the available coal from both of said areas and the relative cost of mining will reasonably permit.

Lessee agrees to make, at its own expense, all surveys and descriptions to properly locate and describe all properties designated for leasing or as may otherwise

be reasonably required under the terms of said Drilling and Exploration Permit and Mining Lease, the laws of the United States, or the Code of Federal Regulations.

ARTICLE XXVI. CONSTRUCTION OF RAILROAD: PIPELINE RIGHT OF WAY

If Lessee has, or can secure, suitable contracts for the sale of 36 million tons of coal involving rail delivery off the Reservation during a maximum period of twenty years to justify the investment, then Lessee agrees to commence or cause to be commenced and completed with dispatch during the first ten (10) years after the expiration of Lessee's Drilling and Exploration Permit, the construction of a standard gauge railroad track from the leased premises to the nearest railroad approximately 130 miles distant. Lessor agrees to furnish to Lessee or the builder of the railroad, without cost, the necessary rights of way and permits across Navajo Tribal lands.

Lessee agrees that when and if such railroad connection is built, the Navajo Tribe shall have the right, subordinate to the uses necessary and incident to Lessee's business, to make nonexclusive use thereof for the Tribe's businesses and purposes, excluding the shipment of coal and organic fuels originating on the Reservation, without compensating the Lessee for any part of the cost it may bear of the construction and operation of the railroad connection; provided, however, the Tribe shall pay the lawful tariffs applicable to such uses and shipments as it makes thereon; and Lessees or designees of the Tribe shall have an option for the nonexclusive use of such railroad connection upon the condition that said Lessees or designees so using said railroad connection will first pay to the Lessee a rea-

sonable charge therefor, based on the distributive share, borne by Lessee, of the cost of construction, maintenance and operation of the railroad, and also based on the proportionate use thereof by the respective parties, and provided further that such use does not interfere with the necessary and convenient use by Lessee.

If Lessee shall enter into arrangements whereby coal mined from the leased premises and from the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964, will be transported by a coal slurry pipeline, Lessor agrees to furnish, without cost, the necessary rights of way and permits across Navajo tribal lands.

ARTICLE XXVII. NOTICES

Any notice, demand, or request provided for in this lease, or given or made in connection with it, shall be deemed to be properly given if delivered in person, or sent by registered or certified mail, postage prepaid, or by telegram, to:

Chairman, Navajo Tribal Council
Window Rock, Arizona

Secretary of the Interior (2 copies)

Sentry Royalty Company
President or Secretary
301 North Memorial Drive
St. Louis, Missouri

Either party may at any time, by written notice to the other, change the designation of the address of the

person so specified as the one to receive notices hereunder.

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman, Navajo Tribal Council
[Illegible]

THE SENTRY ROYALTY COMPANY, Lessee

[Seal Omitted]
ATTEST:
/s/ [Illegible] /s/ By CE Stokes
Secretary President

Dated: June 6, 1966

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman, Navajo Tribal Council

APPROVED Jul 07 1966
[Illegible]
Area Director

FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259, Off Records PAGE 349-384 Incl. RECORDS OF NAVAJO COUNTY, ARIZONA
/s/ Elda R. Probat RECORDER
By _____ DEPUTY

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a notary public on this 28th day of June 1966, personally appeared Raymond Nakai, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council, for and on behalf of the Navajo Tribe of Indians, as his free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Phyllis Nahkai
Notary Public

[Seal Omitted]
My Commission expires
November 25, 1967

ACKNOWLEDGEMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a notary public on this 6th day of June, 1966, personally appeared Ned Hatathli, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same in his official capacity as Director, Resources Division, for and on behalf of the NAVAJO TRIBE OF INDIANS, as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Phyllis Nahkai
Notary Public

[Seal Omitted]
My Commission expires
11/25/67

ACKNOWLEDGEMENT OF LESSEE

State of Missouri)
)ss.
City of St. Louis)

On this 6th day of June, 1966, before me appeared C.E. Stokes and C.S. Mulvaney, to me personally known, who being by me duly sworn, did say that they are President and Secretary of SENTRY ROYALTY

COMPANY (and that the seal affixed to said instrument is the corporatate seal of said corporation) and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said C.E. Stokes and C.S. Mulvaney acknowledge said instrument to be the free act and deed of said corporation.

WITNESS my hand and seal the day and year first above written.

/s/ IRMA D. ONKEN
Notary Public

[Seal Omitted]
My commission expires:
Sept. 3, 1968

Contract No. 14-20-0450-5743

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MINING LEASE

BETWEEN

THE HOPE TRIBE, STATE OF ARIZONA AND
SENTRY ROYALTY COMPANY

THIS MINING LEASE, made and entered into this 6th day of June, 1966, by and between THE HOPI TRIBE of Arizona, organized pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat 984) as amended, "Lessor, and SENTRY ROYALTY COMPANY, a Nevada corporation having offices at 301 N. Memorial Drive, St. Louis, Missouri, hereinafter referred to as "Lessee,"

WITNESSETH:

WHEREAS, under date of June 1, 1964, Lessor and The Navajo Tribe of Indians entered into an agreement with Lessee entitled "Drilling and Exploration Permit" authorizing Lessee to drill and explore for coal and obtain a mining lease on the premises covered by said permit, including the premises being leased hereby; and

WHEREAS, said agreement was supplemental agreement dated August 18, 1964 modified and amended; and

WHEREAS, said agreement, as modified and amended, was approved by the Secretary of the Interior and still remains in full force and effect is valid

as to all parties, notwithstanding an attempt by the Navajo Tribe to unilaterally rescind the same; and

WHEREAS, the Hopi Tribe is legally bound to lease its one-half undivided interest in accordance with the terms of said agreement;

NOW THEREFORE, Lessor and Lessee agree as follows:

ARTICLE I. CONSIDERATION

That the Lessor, for and in consideration of One ($1.00) Dollar, receipt whereof is hereby acknowledged, and of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid and observed by the Lessee, does hereby lease unto said Lessee its undivided one-half interest in a tract of land, held by the United States in trust for the Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, lying and being within the County of Navajo, State of Arizona, more particularly described in Exhibit "D" attached hereto, containing 40,000 acres.

ARTICLE II. TERM AND POSSESSION

This lease is for a term of ten (10) years from the date of approval by the Secretary of the Interior or his authorized representative, and for so long thereafter as the substances produced are being mined by the Lessee in accordance with its terms, in paying quantities, for the purpose and with the exclusive right and license to prospect, mine, and strip such lands for coal and kindred products, including other minerals, except oil and gas, as may be found in connection with said operations (by strip, auger, underground, or other generally

approved mining methods). Lessee has the right and license, in connection with the operation of coal mining on the leased lands: to construct thereon buildings, pipelines, plants, tanks, and other structures; to make excavations, openings, stock piles, dumps, ditches, drains, roads, spur tracks, transmission lines, and other improvements; to place machinery and other equipment and fixtures upon said land, and do all other things upon said leased premises that may be necessary in the efficient operation of coal mining thereon; to occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right of ingress and egress: to develop and utilize water obtained from wells located on the leased premises for use in its mining operations including the transportation by slurry pipelines of coal mined from the leased premises and the premises covered by the lease between Sentry Royalty Company and The Navajo Tribe, dated February 1, 1964; provided, however, that any such water used for such a slurry pipe line shall be obtained from a depth greater than 1,000 feet below the surface and shall be metered and paid for by Lessee at the rate of $1.67 per acre-foot to Lessor annually. Should the Secretary of the Interior determine, at any time, that the operation of wells by Lessee is endangering the supply of underground water in the vicinity or so lowering the water table that other users of such water are being damaged, he may, at his option, either (1) require Lessee or Peabody Coal Company, at its own sole expense, to provide water in quantity and of quality equal to that formerly available from such underground supply to such other users, by deepening the letter's wells or otherwise, or (2) require Lessee or Peabody Coal Company, at its own sole expense, to obtain water for its mining and pipe line operations

from another source, that will not significantly affect the supply of underground water in the vicinity. Any water obtained from wells located in the leased premises not utilized in mining operations (including the slurry pipe line) shall be made readily available for local Hopi use, and at the conclusion of mining operations all wells will be left properly cased. Any water obtained from wells located on the leased premises which is not used in mining operations (including the slurry pipe line) may also be made readily available for local Navajo use. Lessee agrees that it will also pay Lessor $1.67 per acre-foot annually for water obtained from wells located on the premises covered by the said lease between Sentry Royalty Company and The Navajo Tribe, dated February 1, 1964, which is used for the transportation by slurry pipe line of coal obtained from the premises covered by said lease and the premises covered by this lease.

Lessee shall report promptly to Lessor the location and nature of any mineral deposits other than coal encountered on the leased land.

Lessor agrees to cooperate in good faith with Lessee in the securing and utilization of any additional surface that may be required or necessary to meet the needs of new industries that might be attracted to the area, and consistent therewith the Tribe will lease to any responsible industry.

It is contemplated that before the expiration of the ten-year term of this lease, Lessee will have such knowledge of the existence, location and workability of coal reserves found in the area covered by this lease in excess of 200 million tons and of the feasibility of additional large-scale mining and plant operation, as to

enable it to determine with reasonable certainty whether development of reserves in excess of 200 million tons can be successfully prosecuted. Accordingly, the Lessee is to submit not less than ninety (90) days prior to the expiration of the ten-year term, a complete report to the Lessor and to the Regional Mining Supervisor, United States Geological Survey, of its past operations accompanied by declaration of the Lessee's intention regarding the development of reserves in excess of 200 million tons. Lessee shall concurrently inform Lessor of the possible future magnitude of the reserved development. If a reserve in excess of 200 million tons is proven within the leased area and application be made by the Lessee, preference shall be given Lessee over other applicants for the execution of separate leases on areas containing such surplus, under such terms and conditions as may be agreed upon by the Lessor and Lessee and approved by the Secretary of the Interior or his authorized representative.

ARTICLE III. ROYALTY PAYMENTS

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Hopi Tribe, royalties as follows:

A. Three and three hundred and thirty-five thousandths per cent (3.335%) of the monthly gross realization, but in no event less than twelve and one-half ($12^{1/2}$) cents per ton, for all coal sold and utilized off the Executive Order Area of December 16, 1882.

B. Two and six hundred and sixty-five thousandths per cent (2.665%) of the monthly gross realization, but

in no event less than ten (10) cents per ton, for all coal obtained from the leased premises sold and utilized on the Executive Order Area of December 16, 1882.

The term "gross realization," as used herein, means the gross sales price at the mining site without any deduction therefrom of overhead sales costs or any other business expense. No coal mined hereunder shall be sold to any affiliate or subsidiary of Lessee for the purpose of reducing the gross realization.

C. Whenever uranium ores are mined and sold by Lessee, royalty shall be paid to Lessor at one-half of the rate provided in Exhibit "E", attached hereto, and by reference made a part hereof.

D. Whenever other valuable minerals are recovered and sold by Lessee, royalty shall be paid to Lessor at the rate of five (5%) per cent of the sales price f.o.b. Lessee's mine, when value can be determined at the mine. If the mine value cannot be determined, then the value shall be based on net smelter or processing plant returns which shall be the net smelter returns less transportation costs incurred by Lessee after ores have been mined.

E. During any lease year that earned royalties due the Hopi Tribe exceed the rentals due it for that lease year, the Lessee may credit a maximum of $2,000.00 per year of such excess earned royalties against the $10,000.00 advance royalty payments made under the Drilling and Exploration Permit to said Hopi Tribe until the entire advance, without interest, has been repaid.

All royalties accruing for any month shall be due and payable on or before the twenty-fifth of the succeeding month.

ARTICLE IV. ANNUAL RENTAL

Lessee agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Hopi Tribe, in advance, beginning with the date of approval of this lease as annual rental, fifty cents (50¢) per acre per annum for each and every year during the initial five years of this lease, it being understood and agreed that said sum so paid shall be a credit on the royalties accruing during the year for which the payment of annual rental is made, and that said annual rental shall not be refunded to Lessee because of any subsequent surrender or cancellation hereof.

At the end of the initial five years of this lease, Lessee will pay or cause to be paid to Lessor each year in advance for the balance of the term of the lease One ($1.00) Dollar per acre per annum. Such advance rentals after the first five years of the lease term may be carried forward for a maximum of two additional years and credited against earned royalties during those two years when earned royalties exceed this minimum.

It is understood by the parties hereto that if the Lessee can prove to the satisfaction of the Hopi Tribe and the Secretary of the Interior, bonafide contracts for the sale of substantial quantities of said coal, the maximum carry forward period, at the discretion of the Lessor and the Secretary of the Interior, may be increased from two years to five years.

ARTICLE V. DILIGENCE AND PREVENTION OF WASTE

Lessee shall (1) exercise diligence in the conduct of prospecting and mining operations, (2) carry on development and operations in a workmanlike manner and to the fullest possible extent, (3) commit no waste on the said land and suffer none to be committed upon the portion in its occupancy or use, (4) comply with all applicable laws, (5) take appropriate steps for the preservation of the property and the health and safety of workmen, and (6) surrender and return promptly the premises upon the termination of this lease, in as good condition as received, except for the ordinary wear, tear and depletion incident to mining operations and unavoidable accidents in the proper use of the premises, buildings, or permanent improvements erected thereon during the said term by the said Lessee. All Butler, Quonset, Armco and other buildings of like nature and office fixtures and records, personal property, tools, pumping and drilling outfits, boilers, tracks, engines, and mining machinery, and all other personal property and equipment of Lessee shall remain the property of the Lessee and may be removed at any time prior to two years after the termination of the lease by forfeiture or otherwise, provided the payments agreed upon by this lease have been made and the lease terms and regulations applicable thereto have been fully complied with, but not otherwise. Lessee shall have no right, title of interest in any of such improvements that have not been removed by Lessee within the two-year period after the termination of the lease. It is specifically understood, however, that Lessee may be required to remove any of such improvements within said two-year period, or respond in damages for failure to do so.

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor authorize the suspension of mining operations for such time as he considers advisable, but this shall not release the Lessee from paying the advance annual rental. Lessee shall not be in default hereunder, if in its discretion it temporarily discontinues mining operations because of unsatisfactory economic conditions, for periods of not to exceed six (6) consecutive months at any one time.

ARTICLE VII. MONTHLY STATEMENTS

Lessee shall keep an accurate account of all mining operations, showing the sales, price, dates, purchasers, and the whole amount of minerals mined, the amount removed, and the gross receipts derived therefrom, and shall furnish the Secretary of the Interior or his authorized representative, and the Treasurer of said Tribe, sworn monthly reports thereon not later than the twenty-fifth of the succeeding month; and all sums due as royalty and advance rental shall be a lien on all of the unsold minerals obtained from the land herein leased, as security for payment of said sums.

If Sentry wishes to claim any credit against royalties pursuant to Article III, paragraph B, Sentry shall include in such statements an account of the coal tonnage mined from the leased premises which has been consumed or utilized on the Executive Order Area of December 16, 1882, during the month reported.

An audit of the Lessee's applicable accounts and books shall be made annually or at such times as may be directed by the Secretary of the Interior or his authorized representative by certified public accountants approved by the Secretary of the Interior and at the expense of the Lessee.

The Lessee shall furnish free of cost a copy of such audits to the Secretary of the Interior or his authorized representative and to the Hopi Tribe within thirty (30) days after the completion of each audit.

ARTICLE VIII. REGULATIONS

Lessee shall abide by and confirm to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171; provided that no regulations hereafter approved shall effect a change in rate of royalty, the annual rental herein specified, or the term of this lease without the written consent of the parties to this lease; provided further, that the payments to be made by Lessee pursuant to Article IV above shall be deemed to fulfill all requirements of said regulations with respect to annual development work and expenditures therefor, and shall be deemed to be in lieu thereof.

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Lessor. If this lease is divided by the assignment of an entire interest or any part of it, each part shall be considered a separate lease incorporating all the terms

and conditions of the original lease. Lessee, however, shall have the right to assign, transfer, or sublease its interest hereunder to Peabody Coal Company or a subsidiary or affiliate in which Peabody Coal Company has a greater than Fifty (50%) per cent interest.

ARTICLE X. BOND

Lessee agrees to furnish the amount of such bond as may be required by the regulations of the Secretary of the Interior conditioned upon compliance with the terms of this lease.

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

ARTICLE XII. DISPOSITION OF SURFACE

Subject to the provisions of Article XX, the Lessor expressly reserves the right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the reasonable right of Lessee to such surface area necessary for mining; there is further reserved to the Lessor and the United States after consultation with Lessee the right to construct, use and maintain roads, pipelines, powerlines, and telephone lines on and across said lands.

ARTICLE XIII. SURRENDER AND TERMINATION

The Lessee shall have the right at any time during the term hereof to surrender and terminate this lease as to all or any compact and contiguous block of the leased lands covered hereby in not less than ten-acre parcels, upon the payment of all rentals, royalties and other obligations due and payable to that date to the Lessor, and the further sum of One ($1.00) Dollar, provided Lessee has complied with Article XXIV with respect to reseeding. If this lease has been recorded, Lessee shall file a recorded release with his application to the Secretary of the Interior or his authorized representative for termination of this lease.

ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and Lessor shall have the right at any time after thirty (30) days' notice to Lessee, specifying the terms and conditions violated, and after a hearing, if Lessee shall so request, if such violation is not cured within thirty (30) days of receipt of notice, to declare this lease null and void, and Lessor shall then be entitled and authorized to take immediate possession of the land.

ARTICLE XV. SUCCESSORS IN INTEREST OR ASSIGNS

It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to the successors or assigns of the respective parties hereto.

ARTICLE XVI. ACQUISITION BY GOVERNMENT EMPLOYEES

No lease, assignment thereof or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Hopi Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Hopi employees and to utilize services of Hopi contractors whenever feasible. Lessor may by agreement with the Navajo Indians extend the benefits of this article to the Navajo Indians.

Lessee shall make a special effort to work Hopi and Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

ARTICLE XVIII. COVENANT TO HOLD HARMLESS

Lessee will hold the Hopi Tribe and the United States harmless from any suit or claim for personal injuries or property damage arising out of acts or omissions of Lessee or its agents.

ARTICLE XIX. USE OF PREMISES FOR UNLAWFUL CONDUCT

The Lessee further agrees that it will not use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever. That it will

not use or permit to be used any part of said premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages, and that any violation of this clause by Lessee, or with its knowledge, shall render this lease voidable at the option of the Secretary of the Interior and with the concurrence of the Hopi Tribe.

ARTICLE XX. RESERVATIONS

Lessor may hereafter grant to other persons, firms, or corporations, any oil and gas lease, license or permit upon land covered by this lease subject to the following limitations: (a) the provisions of this Article and Article XXI shall be included in any oil and gas lease, license or permit granted by Lessor on the leased land; (b) oil and gas drilling and producing activities may be carried out on any part of the leased premises concurrent with Lessee's mining operations and related activities; (c) no oil rigs or installations of any kind shall be situated with such density as to unduly interfere with Lessee's rights to carry on its mining operations and related activities; and (d) no well may be drilled for oil or gas at any location which, in the opinion of the Mining Supervisor of the United States Geological Survey, or the Lessor, would result in undue waste of coal deposits or constitute a hazard to or interfere with mine operations being conducted for the extraction of coal and associated mineral form the land covered by this lease.

ARTICLE XXI. PIPELINE CROSSINGS

A. Notwithstanding any other provision of this lease, the Lessor and the United States reserve the right without liability of any kind except as provided in this lease to grant to applicants rights of way for pipelines for the transportation of oil, gas, helium or petroleum

products, and for telephone, telegraph and water lines incident to the operation of such pipelines, across and lands embraced in this lease, upon the conditions that, prior to the grant of any such right of way, the applicant therefor, as a condition precedent to such grant, shall file with the Secretary of the Interior or his authorized representative the following express undertakings in writing for the express benefit of Lessee:

(1) That applicant will either bury the pipeline to a sufficient depth or, at a place to be designated by Lessee, construct and maintain a ramp, at applicant's expense, so that loaded vehicles, including Lessee's heavy mining equipment, may pass unhindered over said pipe. Whenever said pipeline is relocated pursuant to subsection (2) of this Section, applicant will either bury the relocated pipe or promptly construct and maintain, at its own expense, a suitable ramp in a new place designated by Lessee. Lessee shall not be responsible for damage to said pipe caused by such vehicles and equipment so crossing said pipeline.

(2) That applicant will make adequate provisions in the construction of the pipeline so that, in the event it is determined by Lessee that mining operations should be conducted within the area of the designated pipeline crossing, or that a power or industrial plant or other building should be built in such area, the line can be expeditiously relocated so as not to interfere with Lessee's operations, and applicant shall make such relocation, including any necessary bridging, at its own expense, within ninety (90) days from receipt of notice in writing from Lessee requesting such relocation. If applicant

fails to make such relocation within such ninety day period, Lessee may relocate the line without liability and at the expense of applicant.

(3) Applicant will at all times keep, maintain and repair, at its own expense, the portion of the pipeline crossing the leased premises in good working order and repair, and in such condition as not to injure, endanger or interfere with Lessee or any person or property on or about the premises.

(4) That applicant will promptly pay any lawful taxes, charges or assessments placed upon or levied against the pipeline or improvements or appurtenances in connection therewith; provided, that applicant may contest the validity or amount of any such tax, charge or assessment and shall not be considered in violation of this stipulation until a reasonable time after final determination of such contest by a competent tribunal.

(5) That applicant will be responsible for any damage to or loss of property, or injury to or death of any person directly or indirectly caused by the enjoyment of pipeline rights, and shall hold Lessee harmless and indemnify it against any and all claims therefor; and shall further hold Lessee harmless from and indemnify it against damage to or loss of property belonging to applicant, or injury to or death of any person on or about the pipeline crossing on behalf of or at the invitation of applicant.

(6) That applicant shall specify in writing the address to which all notices and requests to be given or made by Lessee may be mailed.

B. Lessor agrees that:

(i) No pipeline right of way granted shall exceed fifty (50) feet in width;

(ii) Timely notice shall be given to Lessee of any application for pipeline rights over the leased premises before the same is granted; and

(iii) An executed duplicate of the undertakings specified in paragraph A and a true copy of the grant of pipeline rights shall be furnished Lessee upon the granting of any application for pipeline rights over the leased premises.

ARTICLE XXII. LIABILITY FOR DAMAGES

The Lessee shall be liable for any and all damages resulting from operations under this lease, including injury to the Lessor, tenants, licensees and surface owners, and for any and all damage to, or destruction of, all property, including but not limited to crops, vegetation and improvements, caused by Lessee's operations hereunder.

ARTICLE XXIII. EXISTING MINES

Lessee agrees that it will not sell coal to local reservation markets now being served by existing mines operated by Hopi Indians as of the date hereof, so long as these existing mines continue to service the local reservation markets. Lessee shall not, however, be in any manner restricted from developing new markets or uses for coal upon the reservations.

ARTICLE XXIV. RESEEDING

Lessee agrees to cooperate fully with the Lessor and the Secretary of the Interior in reseeding areas where strip coal mining activities have been completed and to bear the full expense of such reseeding program. Where serious erosion hazards are created by operations of Lessee hereunder, Lessee agrees to take such corrective action as may be necessary, within the scope of accepted soil conservation practices.

ARTICLE XXV. PERMITS

If Lessee shall enter into arrangements whereby coal mined from the leased premises and from the premises covered by the lease between Sentry Royalty Company and the Navajo Tribe, dated February 1, 1964, will be transported by coal slurry pipe line, Lessor agrees to furnish, without cost, the necessary rights of way and permits across Hopi Tribal lands.

ARTICLE XXVI. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or sent by registered or certified mail, postage prepaid, or by telegram, to the persons specified below:

To or upon the Tribe.

Chairman
Hopi Tribal Council
Keams Canyon, Arizona

To or upon the Secretary of the Interior (2 copies)

Both to Superintendent of Hopi Agency
Keams Canyon, Arizona

To or upon Sentry Royalty Company,

President or Secretary
Sentry Royalty Company
301 N. Memorial Drive
St. Louis, Missouri

Either party may at any time, by written notice to the other, change the designation or address of the person so specified as the one to receive notices hereunder.

IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE HOPI TRIBE OF INDIANS
Lessor

By DEWEY HEALING
DEWEY HEALING
Chairman, Hopi Tribal
Council

THE SENTRY ROYALTY COMPANY
Lessee

/s [Illegible]
Vice-President

FILED AND RECORDED AT THE REQUEST
Jennings, Strouss, Salmon & Trask
May 26th A.D. 1967 AT 8:00 O'CLOCK A.M.
IN DOCKET 259 Off. Records PAGE 385-412
RECORDS OF NAVAJO COUNTY, ARIZONA Inclusive
Ella R. Probst RECORDER
BY _____ DEPUTY

ACKNOWLEDGMENT OF LESSOR

State of Arizona)
)ss.
County of Apache)

Before me, a Notary Public, on this 29th day of June, 1966, personally appeared Dewey Healing, to me known to be the identical person who executed the within and foregoing lease and acknowledged to me that he executed the same in his official capacity as Chairman of the Hopi Tribal Council for and on behalf of the Hopi Tribe of Indians as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ [Illegible]
Notary Public

My Commission Expires: 7-13-1967

ACKNOWLEDGMENT OF LESSEE

State of Missouri)
)ss.
City of St. Louis)

On this 25th day of June, 1966 before me appeared E. R. Phelps to me personally known, who being by me duly sworn, did say that he is a Vice President of Sentry Royalty Company, and that the seal affixed to the foregoing instrument is the corporation seal of said corporation, and that said instrument was signed and

sealed in behalf of said corporation by authority of its Board of Directors and said E. R. Phelps acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and seal the day and year first above written.

/s/ [Illegible]
Notary Public
In and for the County of
St. Louis which adjoins the
City of St. Louis

My Commission Expires: Dec. 3, 1966

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Phoenix Area Office
P. O. Box 7007
Phoenix, Arizona

The within Mining Lease is approved pursuant to authority delegated to Commissioner of Indian Affairs by Secretarial Order No. 2508 and by Commissioner to Area Director by Bureau Order No. 551 and Amendments thereto and under authority delegated by Washington Office letter of October 8, 1964 (Real Property Management Minerals 5427-64).

/s/ [Illegible]
ACTING Area Director

Date: June 20, 1966

State of Arizona)
ss.
County of Maricopa)

Before me, a Notary Public, in and for said county and State, on this 20th day of June, 1966, personally appeared George W. Hedden, whose name is subscribed to the foregoing Mining Lease, Contract No. 14-20-0450-5743, dated June 6, 1966, as ACTING Area Director, Phoenix Area Office, Bureau of Indian Affairs, now is and was at the time of signing the same, Acting Area Director of the Phoenix Area Office, Bureau of Indian Affairs; and he personally acknowledged to me that he executed said instrument as his free and voluntary act and deed for the uses and purposes set forth therein.

/s/ MARY M. GILBERT
Notary Public

My commission expires July 23, 19XX.

GUARANTY

In consideration of the execution of the above lease by the Hopi Tribe, Peabody Coal Company hereby guarantees the due performance by Sentry Royalty Company of all covenants and agreements on its part therein contained, and the payment of all damages, costs and expenses which by virtue of said lease may become recoverable from said Sentry Royalty Company by the Hopi Tribe.

ATTEST: PEABODY COAL COMPANY

/s/ MULVANEY By H. D. HAGEN
Secretary Vice President

Date: June 6, 1966

TRACT NO. 1

Beginning at the Department of Interior's Bureau of Land Management Mile Post 23.5, a brass plate marked Navajo, EO 1882, 23.5 M, and located on the 36°39' parallel of latitude thence east along said 36°30' parallel distance of 16,092.64'; thence south 3,719.18'; thence west 2,770.00'; thence south 3,650.00'; thence west 2,096.31'; thence south 3,902.08'; thence west 5,803.43'; thence South 24°17' west 7,198.18'; thence east 5,143.65'; thence north 79°27' east 2,013.07'; thence north 56°49' east 3,461.95'; thence south 59°47' east 3,795.59'; thence south 14,220.00'; thence east 1,470.06'; thence south 8,477.66'; thence west 21,351.27'; thence north 8,247.66'; thence east 7,361.27'; thence north 4,560.00'; thence west 4,210.00'; thence north 5,170.00'; thence west 2,920.00'; thence north 10,110.00'; thence east 2,930.00'; thence north 37°49' east, 3,585.99'; thence north 1,889.40'; thence west 10,381.69'; thence north 7,369.18'; thence east 9,137.36' to the point of beginning, containing in all 15,595.81 acres, more or less, and all being located in Navajo County, Arizona.

The above description contains all or a part of the following sections as shown on the "Arizona Protraction Diagram No. 35, Bureau of Land Management Area 2, Cadastral Engineering" map dated February 11, 1960:

T. 36 N., R. 18 E.
26, 27, 28, 29, 30, 31, 32, 33, 34, 35

T. 35 N., R. 18 E.
3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

TRACT NO. 2

Beginning at a point, said point being 29,092.64' east of Mile Post 23.5, being the same mile post as described in Tract No. 1, and on the 36°30' north parallel of latitude; thence east along said parallel 24,769.40'; thence south 40,176.84'; thence west 4,769.40'; thence north 4,807.66'; thence west 4,000.00'; thence north 1,754.65'; thence west 6,448.91'; thence south 6,562.31'; thence west 13,551.09'; thence north 4,807.66'; thence west 4,00000'; thence north 4,000.00'; thence east 3,000.00'; thence north 4,000.00'; thence west 3,000.00'; thence north 4,000.00'; thence east 5,200.00'; thence north 4,000.00'; thence north 26°01' west 2,040.21'; thence north 2,350.00'; thence east 4,000.00'; thence north 15, 369.18' to the point of beginning, containing in all 24,404.19 acres more or less, and all being located in Navajo County, Arizona.

The above description contains all or a part of the following sections on the "Arizona Protraction Diagram No. 35, Bureau of Land Management Area 2, Cadastral Engineering" map dated February 11, 1960:

T. 36 N., R. 19 E.
25, 26, 27, 28, 29, 32, 33, 34, 35, 36

T. 35 N., R. 19 E.
1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27,
28, 29, 30, 31, 32, 33, 34, 35, 36

T. 35 N., R. 18 E.
13, 24, 25, 36

THE HOPI TRIBE
Resolution No. H-12-66

BE IT RESOLVED that Dewey Healing, Chairman of the Hopi Tribal Council, is hereby authorized to enter into a mining lease with Sentry Royalty Company, a Nevada corporation, in accordance with the Drilling and Exploration Permit by and between the Hopi Tribe, the Navajo Tribe and Sentry Royalty Company, dated June 1, 1964, as amended by supplemental agreement dated August 18, 1964; subject to the approval of the tribal attorney as to form of lease and subject also to the approval of the Secretary of the Interior or his authorized agent.

CERTIFICATION

I hereby certify that the foregoing Resolution was regularly adopted by the Hopi Tribal Council on the 16th day of May, 1966, by a vote of 10 in favor and 0 opposed, the Chairman not voting, after full and free discussion on the merits.

/s/ DEWEY HEALING
DEWEY HEALING, Chairman
Hopi Tribal Council

ATTEST:

/s/ DORIS NASEYOWMA
Doris Naseyowma, Acting Secretary
Hopi Tribal Council

APPROVED:

/s/ CLYDE W. PENSONEAU MAY 24, 1966
Clyde W. Pensoneau, Superintendent
Hopi Indian Agency

PERCENTAGE ROYALTY SCHEDULE FOR
URANIUM AND OTHER MINERALS
ASSOCIATED THEREWITH

Mine Value Per Dry Ton				Royalty Percentage of Mine Value Per Dry Ton
$ 0.01	to	$ 10.00	inclusive	12%
10.01	to	20.00	"	13.3%
20.01	to	30.00	"	14.6%
30.01	to	40.00	"	15.9%
40.01	to	50.00	"	17.2%
50.01	to	60.00	"	18.5%
60.01	to	70.00	"	19.8%
70.01	to	80.00	"	21.1%
80.01	to	90.00	"	22.4%
90.01	to	100.00	"	23.7%
100.01	to	more		25%

"MINE VALUE PER DRY TON", wherever used herein is hereby defined as the dollar value per dry ton of crude ores at the mine as paid for by the Atomic Energy Commission or other government authorized agency before allowance for transportation and development; however, if the government at any time hereafter does not establish and pay for said ores on a fixed or scheduled dollar value per dry ton of crude ores at the mine, or said ores contain saleable minerals, some, or all, of which are disposed of to a custom treatment plant or smelter for treatment, and sale, then mine value per dry ton shall be the gross value per dry ton of said crude ore as paid for by the Atomic Energy Commission or other government authorized agency mill or other buyer, less any allowances or reimbursements for the following specific items: (1) transportation of ores (2) allowances for exploration for, or

development of ores and (3) treatment or beneficiation of ores; which specific items shall in such event be deducted from the gross sales price received from the metal content of said ores by the seller before said percentage royalty is calculated and paid.

BEST AVAILABLE COPY

MONET 259 PAGE 410

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

EVIDENCE OF AUTHORITY OF OFFICERS TO EXECUTE PAPERS

(To be sworn to by secretary or president of a corporation and sealed with its seal)

I solemnly swear that E. R. Phelps was on the 6th day of June, 1966, the duly elected, qualified, and acting vice president, ~~and secretary~~, respectively, of Sentry Royalty Company

a corporation organized under the laws of Nevada on which day he executed the lease for and in behalf of said corporation, covering certain Trust or Restricted Indian lands on the Navajo-Hopi Reservation, in the State of Arizona; that he was fully empowered to execute said instrument and all papers in connection therewith, and that his action in executing the same binds the said corporation to full performance of all obligations thereunder.

A. D. Mulvaney
Secretary
(Title)

[CORPORATE SEAL]

This 6 th day of June, 1966

Subscribed and sworn to before me this 6th day of June, 1966

(Signed) Irma D. Inkens
Notary Public
(Title)

[SEAL]

My Commission Expires Sept. 3, 1968

275

*Indicate whether lease, bond, or assignment.

U. S. GOVERNMENT PRINTING OFFICE 16—62502-6

CONFIDENTIAL

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AMENDMENTS TO COAL MINING LEASE
No. 14-20-0603-8580
BETWEEN THE NAVAJO TRIBE AND PEABODY
COAL COMPANY

WHEREAS, a mining Lease designated No. 14-20-0603-8580 was made and entered into on February 1, 1964, between the Navajo Tribe and Sentry Royalty Company; and

WHEREAS, this Lease was approved by the designated representative of the Secretary of the Interior on August 28, 1964; and

WHEREAS, Peabody Coal Company, a Delaware corporation, has been assigned all of Sentry Royalty Company's right, title and interest in and to the Lease; and

WHEREAS, Peabody Coal Company has entered into and is currently performing under a long term coal supply agreement with the Participants in the Mohave Project who are Southern California Edison Company, Department of Water and Power of the City of Los Angeles, Nevada Power Company, and Salt River Project Agricultural Improvement and Power District (hereinafter referred to as "Mohave Participants"), for the sale and purchase of certain coal from the leased premises to the Mohave Project; and

WHEREAS, Peabody Coal Company has also entered into and is currently performing under a long term coal supply agreement with the Co-Owners in the Navajo Generating Station who are Arizona Public Service Company, Department of Water and Power of the City of Los Angeles, Nevada Power Company, Salt River Project Agricultural Improvement and Power District,

and Tucson Electric Power Company, and along with the Bureau of Reclamation of the United States Department of the Interior, are hereinafter referred to as "Navajo Participants", for the sale and purchase of certain coal from the leased premises to the Navajo Generating Station; and

WHEREAS, Peabody Coal Company has, pursuant to a package of amendments to Lease Nos. 14-20–0603-8580 and 14-20-0603-9910, both between Peabody and the Navajo Tribe, proposed to the Navajo Tribe to lease 90 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-8580, and lease the Navajo Tribe's undivided one-half interest in 180 million additional tons of surface mineable coal within the boundaries of the leasehold under Lease No. 14-20-0603-9910; and

WHEREAS, these amendments to Lease No. 14-20-0603-8580 are a part of such package; and

WHEREAS, Peabody Coal Company, pursuant to amendments to Lease No. 14-20-0450-5743 between Peabody Coal Company and the Hopi Tribe of Indians has proposed to the Hopi Tribe to lease that Tribe's undivided one-half interest in the same 180 million tons of surface mineable coal as are proposed for lease under the amendments to Lease No. 14-20-603-9910; and

WHEREAS, Peabody Coal Company and the Navajo and Mohave Participants expressly acknowledge the importance to members of the Navajo Tribe of the preservation of Navajo lands and the minimization of disruption to the ways of life of Navajos living on or near the areas leased hereunder; and

WHEREAS, the Navajo Tribe expressly acknowledges the importance for members of the Navajo Tribe

of the benefits accruing to the Tribe under this Lease as herein amended and acknowledges further that some disruption to Navajo lands and Navajo tribal members living on or near the areas leased hereunder will be necessary if such benefits are to be realized; and

WHEREAS, in consideration for various additional undertakings of Peabody Coal Company commencing on the effective date of these amendments rather than at the end of the current lease, the Navajo Tribe does hereby agree to amend Lease No. 14-20-0603-8580 to authorize Peabody Coal Company to mine this additional coal rather than executing a separate lease or leases to cover the areas containing this coal, it being understood that the additional 90 million tons will all be mined within the surface area covered by Lease No. 14-29-0603-8580;

NOW, THEREFORE, it is agreed between the Navajo Tribe (hereafter referred to as "Lessor") and Peabody Coal Company (hereafter referred to as "Lessee") that Coal Mining Lease No. 14-20-0604-8580 is hereby amended as follows:

1. *Term and Possession.* At the end of the first paragraph of Article II, p. 2, the following is added:

> In the event the production of coal in paying quantities by Lessee from the premises leased hereunder ceases prior to the cessation of production of coal in paying quantities by Lessee from the premises covered by Lease No. 14-20-0603-9910, Lessor will consent to such applications by Lessee for such surface leases as may be reasonably necessary to ensure that Lessee retains the right for the duration of the term of Lease No. 14-20-0603-9910 to use and occupy as much of the surface of the premises leased

hereunder as may be needed for the operation of mining facilities including, without limitation, roads, power lines, communication lines, overland conveyors, buildings, equipment, and other facilities, in support of Lease No. 14-20-0603-9910. Such surface leases shall be for a total area not to exceed 2,000 acres and shall provide that Lessee shall pay to Lessor for any land under those surface leases at the rate of Fifty Dollars ($50.00) per acre per year, which payment shall be in lieu of any rentals or advance royalties provided under this Coal Mining Lease as herein amended. Application(s) for such surface leases shall be submitted to Lessor by Lessee no later than nine (9) months prior to the projected cessation of production under this Lease and shall identify with specificity the areas for which surface leases are required. Lessee agrees to complete promptly the reclamation of the remainder of the premises leased hereunder in accordance with applicable law. After completion of such reclamation, this Lease shall be deemed terminated with respect to those portions of the premises leased hereunder which are not subject to executory surface leases.

2. *Additional Coal.* The fourth paragraph of Article II of the Lease is deleted and the following paragraph is put in its place:

Lessor does hereby lease to Lessee 290 million tons of surface mineable coal in the leased premises comprising the 200 million tons originally leased plus an additional 90 million tons as of the effective date hereof. Such coal shall be mineable by strip, auger, or other generally approved surface mining methods to the extent economically feasible as

determined by appropriate federal agencies using standards applicable to federal coal. Lessor and Lessee agree that, for purposes of Navajo taxes, if applicable on any of the premises leased hereunder, the value of and expenses attributable to such additional 90 million tons of coal shall not be considered part of the active mining activities of Lessee until the earlier of (a) issuance of any mining permit(s) (conditional, temporary or otherwise) by applicable governmental authority authorizing commencement of mining of any coal in excess of 200 million tons from the leased premises; or (b) January 1, 2005. Until such inclusion in active mining activities, such additional coal and associated expenses shall be deemed, for such tax purposes, as an inactive, non-productive leasehold interest and shall be assessed on the per acre basis established by Lessor for such reserves for the areas of additional coal shown on Exhibit A-1. Lessee agrees that, to the extent possible, Lessee will mine the additional coal granted hereunder in proportion to the amount of additional coal granted under the amendments to Lease No. 14-20-0603-9910, so that with 90 million tons of additional coal on Lease No. 14-20-0603-8580 and 180 million tons of additional coal on Lease 14-20-0603-9910, Lessee would attempt to mine one ton of additional coal from the premises covered by this Lease No. 14-20-0603-8580 for every two tons of additional coal mined from the premises covered by Lease No. 14-20-0603-9910. This mining would be monitored on an annual basis. It is understood that Lessee can adhere to this method of operation so long as it does not have a material and adverse effect on Lessee's ability to meet the coal quality required by the Mohave and Navajo Participants for

those Projects. Lessee shall provide Lessor reasonable access to the records maintained under Article IX hereof for the purpose of monitoring Lessee's compliance with the terms of this Lease, including audits of customer invoices and reasonable access to technical information used for assessment of the coal reserve leased hereunder.

3. *Royalty Rate.* Article IV of the Lease, pp. 4-5, is replaced in its entirety with the following language:

In consideration of the foregoing, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior or his authorized representative for the use and benefit of the Navajo Tribe, royalties for mining under this Lease as follows:

(a) Commencing on the effective date of these amendments, twelve and one-half percent (12.5%) of the monthly gross realization for all coal obtained from the premises leased under this Lease as herein amended, computed based on F.O.B. mines in accordance with the method utilized by the United States Government for computing royalties on federal coal leases, as such method may be revised from time to time; except that, (i) in the event the method utilized by the United States Government for computation of royalties on federal coal leases is modified by the United States Government after May 1, 1987, such modification shall be applicable only to coal sold by Lessee after the law or regulation changing such method comes into force; and (ii) in the event of a modification of the method of calculation of gross realization utilized by the United States Government for federal coal leases, the change (upward or downward) in the amount calculated as gross realization hereunder resulting from such modification shall be limited to an amount not to exceed five percent (5%) of gross realization calculated in accordance with the United States Government method applicable to federal coal leases prior to such modification. The parties hereby agree that for the purposes of this subsection, the current method utilized by Lessee in calculating gross realization under Lease No. 14- 20-0603-8580 as illustrated in Exhibit A-2 which is attached hereto and incorporated herein by reference, shall be deemed to constitute the current method of calculating gross realization utilized by the United States Government for federal coal leases as of May 1, 1987. Exhibit A-2 also contains a formula and example illustrating the application of the five percent (5%) limitation referenced above. Exhibit A-2 shall be revised by Lessor and Lessee as necessary to reflect and account for modifications in the United States Government method of calculating gross realization applicable to federal coal leases.

(b) Ten (10) years from the effective date of these amendments, and at the end of each successive ten (10) year period thereafter for the duration of the Lease term, the coal royalty percentage rate will either stay at twelve and one-half percent (12.5%) of gross realization or move to the minimum percentage rate for royalty applicable to federal coal leases for surface mineable coal, whichever is then greater.

Notwithstanding the foregoing, if either Lessor or Lessee determines it will be dissatisfied with this automatic revision of the royalty rate at the conclusion of such ten (10) year period, the dissatisfied party shall notify the other party of such dissatisfaction no later than nine (9) months prior to the expiration of the applicable ten (10) year period. Promptly after any

such notice is given, Lessor and Lessee shall begin good faith negotiations to reach agreement on a royalty rate for the succeeding ten (10) year period. If no agreement on royalty rate is reached within four (4) months of delivery of the notice, the issue of royalty rate may be taken to arbitration under the procedures provided in Article XXXVII herein for determination, consistent with the terms hereof, of an equitable royalty rate, considering the interests of Lessor, Lessee and the Navajo and Mohave Participants. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than twelve and one-half percent (12.5%) of gross realization computed in accordance with this Article, as amended. The parties shall utilize their best efforts to complete the arbitration prior to the expiration of the applicable ten (10) year period and shall direct the arbitrators to conduct the proceedings and render a decision prior to such expiration. Any new adjustment in royalty rate established by arbitration shall be applicable from and after the later of either the date of the arbitration award or the expiration of the applicable ten (10) year period.

(c) Whenever uranium ores are mined and sold by Lessee, royalty shall be paid to Lessor at the rate provided for in the "Percentage Royalty Schedule" set out in Resolution of the Advisory Committee of the Navajo Tribal Council (ASC-37-55) dated September 27, 1955, as amended. In the event that either Lessor or Lessee is at any time dissatisfied with such rate or any adjustment hereunder as an accurate reflection of prevailing economies for uranium under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty

rate. If no agreement is reached within six (6) months, the issue will be taken to arbitration under the procedures provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than the rate provided in the "Percentage Royalty Schedule" referenced above. Whenever minerals other than coal or uranium are mined and sold by Lessee, royalty shall be paid to Lessor at the rate of ten percent (10%) of the gross F.O.B. mine or mill price, whichever is greater. In the event that either Lessor or Lessee is at any time dissatisfied with this royalty rate or any adjustment hereunder as an accurate reflection of prevailing economies for any such mineral under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty rate. If no agreement is reached within six (6) months, the issue will be taken to arbitration under the provisions provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator and arbitrators in no case will result in a royalty rate of less than the rate provided in the "Percentage Royalty Schedule" reference above. Whenever minerals other than coal or uranium are mined and sold by Lessee, royalty shall be paid to Lessor at the rate of ten percent (10%) of the gross F.O.B. mine or mill price, whichever is greater. In the event that either Lessor or Lessee is at any time dissatisfied with this royalty rate or any adjustment hereunder as an accurate reflection of prevailing economies for any such mineral under the particular circumstances, Lessor and Lessee shall begin good faith negotiations to reach agreement on an adjusted royalty rate. If no agreement is reached within six (6) months,

the issue will be taken to arbitration under the provisions provided in Article XXXVII herein to establish a rate consistent with such economies. However, the decision of the arbitrator or arbitrators in no case will result in a royalty rate of less than ten percent (10%) rate specified above.

(d) Except for those processes associated with the crushing of quarry stone to aggregate for road maintenance purposes or other public uses, the right to extract non-coal minerals granted in this Article does not grant approval for any on-site milling operations. Specifically, the Lessor prohibits all uranium or gold/silver milling on the Lease areas or operations located adjacent to the Lease area.

(e) All royalties accruing for any month shall be due and payable on or before the 15th of the succeeding month, by electronic transfer.

(f) No coal or other minerals mined hereunder shall be sold to any affiliate or subsidiary of Lessee with the effect of reducing monthly gross realization.

(g) If, during the period January 1 through March 31 of any calendar year following the effective date of these amendments, royalties payable by Lessee to Lessor for coal obtained from the premises leased hereunder for such periods are less than One Million Dollars ($1,000,000), Lessee shall pay Lessor on or before April 15 the sum equal to the difference between such royalties payable for such period and One Million Dollars ($1,000,000). Such differential sum so paid shall be considered advance royalty and shall constitute a fund against which any royalty for coal obtained from the leased premises during such calendar year shall first be credited or charged so that royalty on coal

production occurring through December 31 of the year of such payment shall not be due and payable at any time except to the extent that royalty on coal production during such calendar year exceeds the amount of such differential payment. Nothing in this subsection shall be construed as a waiver of Lessor's rights and remedies in the event Lessee ceases production of coal in paying quantities from the leased premises.

4. *Adjusted Royalty Payment.* Article VI, entitled Termination of Federal Jurisdiction, p. 7-8, is deleted from the Lease and the following is substituted:

VI. *Adjusted Royalty Payment*

Lessor and Lessee recognize that a dispute has arisen between them with regard to the validity and reasonableness of the royalty adjustment decision of the Bureau of Indian Affairs Navajo Area Director dated June 18, 1984, which decision was purported to be made pursuant to Article VI of the original terms of this Lease No. 14-20-0603-8580. Such decision is currently on appeal by Lessee before the Assistant Secretary of the Interior for Indian Affairs.

(a) In consideration of the benefits associated with these lease amendments, as well as those associated with amendments to Lease No. 14-20-0603-9910, Lessor and Lessee hereby jointly move that the royalty adjustment decision of the BIA Navajo Area Director dated June 18, 1984, pertaining to this Lease be vacated and declared to be of no force or effect and, by approving these lease amendments, the Secretary of the Interior does hereby vacate that royalty adjustment decision and render that royalty adjustment decision to be without legal force or effect.

(b) Upon the approval of these amendments by the Secretary of the Interior, the provisions of Article IV and VI of these lease amendments shall be the sole exclusive method for the determination or readjustment of royalty rates under Lease No. 14-20-0603-8580 for periods beginning on and after February 1, 1984.

(c) For all coal obtained from the premises leased under this Lease during the period February 1, 1984, until the effective date of these amendments, Lessee shall pay Lessor twelve and one-half percent (12.5%) of the gross realization received by Lessee for such coal, with gross realization computed in accordance with the method utilized at the time the coal was sold for computing royalties on federal coal leases. The payment under this subparagraph (c) shall be due and payable within ten (10) calendar days of the effective date of these amendments. For purposes of Article XXXV herein such payments shall be allocated so that payment shall be deemed to be made in the year in which the coal was sold.

(d) For the payments described in subparagraph (c) above and other good and valuable consideration contained in this Lease as herein amended, Lessor agrees not to assert any claim or other demand for any amounts as past due royalty under this Lease for the period February 1, 1984, to the effective date of these lease amendments or interest thereon, except that nothing in this provision shall relieve Lessee from the obligation to pay any additional amounts determined to be due to Lessor under subparagraph (c) above after audit or review of Lessee's production and/or royalty data.

5. *Assignment of Lease.* Article XI of the Lease, p. 11-12, is replaced in its entirety with the following language:

> Lessor recognizes that Lessee has granted the Navajo Participants and the Mohave Participants certain existing rights to conditional partial assignments of Lease No. 14-20-0603-8580 and first rights of refusal to purchase Lessee's interest in the mining operation thereunder. Lessee further shall have the right by notice to Lessor but without further consent of Lessor or the Secretary of the Interior to assign, transfer or sublease its interest hereunder to the Mohave Participants or the Navajo Participants or any one of them or Peabody Holding Company, Inc., or a subsidiary or affiliate in which Peabody Holding Company, Inc. or Peabody Coal Company has a greater than fifty percent (50%) interest, provided Lessee remains a guarantor of the performance of any such subsidiary or affiliate assignee. However, subject to those rights, Lessee shall not assign this Lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, without the written approval of the Lessor and the Secretary of the Interior and, in the event the Navajo Participants and the Mohave Participants elect not to exercise their first right of refusal, to acquire Lessee's interest herein, as provided in their respective Coal Supply Agreements with Lessee, the Navajo Tribe shall have the next first right of refusal to any bona fide offer acceptable to Lessee from a third party to purchase Lessee's interest in the mining operation, including all mining equipment and facilities located thereon at the same price and on the same terms

offered. Lessee shall give written notice to Lessor of any such bona fide offer which Lessee desires to accept as promptly as possible following receipt of notice from the Navajo Participants and the Mohave Participants expressly declining to exercise their rights of first refusal or following expiration of the time period in which the Navajo Participants and the Mohave Participants were required to exercise their rights of first refusal whichever occurs first. Lessor shall notify Lessee in writing within one hundred eighty (180) days of the receipt of such notice of its decision on the exercise of such right of refusal. In the event Lessor fails to notify Lessee in writing within said one hundred eighty (180) day period, or in the event Lessor expressly declines to exercise such right of refusal, Lessee shall be free to accept such offer from a third party. Any purchase and sale of Lessee's interest in the mining operation hereunder shall be subject to the obligations herein and except as provided herein any required approvals from governmental authorities. In the event Lessor exercises its right of refusal herein granted, the parties shall by mutual consent determine the various details pertaining to such purchase. Any disagreement relating to any details of the purchase herein provided for shall be subject to arbitration in accordance with the provisions of Article XXXVII herein.

Lessor acknowledges that such transfers by Lessee of its interest herein as are authorized hereunder to be completed without Lessor consent are not subject to Lessor disapproval under terms of the Navajo Tribal Code, applicable to transfers of such interests. For any processing of such transfers,

Lessor may charge Lessee a fee which shall not exceed One Hundred Thousand Dollars ($100,000) and which shall be in lieu of any other charges or fees charged by Lessor in connection with the processing of such transfers. Both Lessor and Lessee acknowledge that, in the event of a transfer of Lessee's interest, in whole or in part, to the Navajo or Mohave Participants, or any one of them, Lessor and the Mohave and Navajo Participants agree that for the purposes of determining royalties and Navajo taxes (to the extent relevant to tax assessments or computations), the gross mine price per ton shall be that price which the respective assignee would have paid to Peabody for coal pursuant to their respective Coal Supply Agreements which were in effect at the time of the assignment. The mine price per ton will be adjusted thereafter, pursuant to the provisions of the Coal Supply Agreements, as though those agreements were still in effect and no assignment had taken place. In the event that any such assignee enters into an agreement with a third party for the mining of the coal leased hereunder and the consideration paid such third party on a per ton basis for such mining exceeds the per ton price which would have been paid Peabody pursuant to such respective Coal Supply Agreements, the percentage royalty rate applicable hereunder shall be applied to the consideration paid under such new supply agreement.

In the event of such assignment to the Navajo or Mohave Participants or any one of them, the mine price per ton will be adjusted either pursuant to the provisions of the existing Coal Supply Agreement(s) as though those agreements were still in effect and

no assignment had taken place, or on the basis of a new supply agreement, whichever is determined by Lessor to be most beneficial.

6. A New Article XXXI shall be added to the lease as follows:

XXXI. *Scholarships*

Within Thirty (30) days of the effective date of these amendments, Lessor shall establish a fund to be administered by the Navajo Tribe to provide educational opportunities for members of the Navajo Tribe and Lessee shall contribute annually to such fund. The initial contribution shall be One Hundred Thousand Dollars ($100,000) and shall be made within thirty (30) days after the effective date of these amendments. The amount of this contribution shall be increased by Two Thousand Dollars ($2,000) per year for the next twelve 12 years and shall thereafter remain at One Hundred and Twenty-Four Thousand Dollars $124,000 per year annually for the remainder of the term of this Lease as amended. Such contributions are to be made on the date in each year no later than thirty (30) days after the anniversary of the effective date.

7. A new Article XXXII shall be added to the lease as follows:

XXXII. *Effective Date of Amendments*

These amendments shall take effect upon the approval by the Secretary of the Interior (without delegation) of the package of amendments to Lease Nos. 14-20-0603-8580 and 14-20-0603-9910 between Lessee and Lessor of which package these amendments are a part, and like approval of the amendments to Lease No. 14-20-0450-5743 between Lessee and the Hopi Tribe, whichever approval occurs later. If these

necessary Secretarial approvals are not obtained within ninety (90) days of the resolution adopted by the Navajo Tribal Council approving the amendment package, either Lessor or Lessee may at its option rescind its agreement to the amendment package by written notice to the other.

8. A new Article XXXIII shall be added as follows:

XXXIII. *Bonus Payments*

In consideration of these amendments, Lessee hereby agrees to pay or cause to be paid to the Secretary of the Interior of his authorized representative for the use and benefit of the Navajo Tribe, bonuses as follows:

(a) One and One-Half Million Dollars ($1,500,000) due and payable upon the effective date of these lease amendments.

(b) One Million Dollars ($1,000,000) payable upon completion of the first coal royalty reopener process pursuant to Article IV, as herein amended, scheduled ten (10) years from the effective date of these amendments. "Completion of the first coal royalty reopener process" shall be understood to mean (i) automatic adjustment pursuant to Article IV(b), as herein amended, or, if the royalty rate is not adjusted automatically, (ii) the execution of a binding agreement between the parties on a royalty rate for the succeeding ten (10) year period, or (iii) the rendering of an arbitration decision within the arbitration process with regard to such royalty rate pursuant to Articles IV and

XXXVII herein, without regard to any judicial review of that decision. Nothing contained herein shall be construed to require a bonus payment at the completion of any coal royalty reopener process other than the first.

(c) Seven and One-Half Million Dollars ($7,500,000) payable at such time as Lessee commences mining of the additional coal granted under these lease amendments. In the event such mining of the additional coal does not commence by December 31, 2004, the amount of this bonus payment shall be escalated to reflect changes in the Consumer Price Index during the period January 1, 2005, until mining of the additional coal commences when payment of the bonus, as escalated, is due. For the purposes of this Subsection (c), mining of the additional coal shall not be deemed to have commenced until such time as Lessee has mined a total of 200 million tons from within the premises under this coal mining Lease No. 14-20-0603-8580 and Lessee proceeds to mine coal in excess of the 200 million tons from within those premises.

9. A new Article XXXIV shall be added as follows:

XXXIV. *Tribal Taxation*

(a) By approval of the Lease amendments adding this Article XXXIV, Lessor, through its Tribal Council, acting in its government and proprietary capacities, expressly confirms the validity of Sections 7(e) and 7(f) of the Indenture of Lease for Navajo Units

1, 2 and 3 (the "Navajo Lease") and Advisory Committee Resolution No. ASC-126-81 relating to such Navajo Lease provisions. Lessor agrees that, in the event it is alleged that Lessor or its subordinate agencies or units have acted in contravention of Navajo Lease Sections 7(e) and 7(f), Lessor and its subordinate agencies and units consent to be sued by Lessee, the Navajo Participants, individually or collectively, or the Black Mesa and Lake Powell Railroad in the United States District Court for the District of Arizona for the limited purpose of securing a declaration of the parties' rights under Section 7(e) and 7(f) of the Navajo Lease and injunctive relief as may be necessary to enforce those referenced provisions of the Navajo Lease. Lessor and its subordinate agencies and units further agree they will not raise sovereign immunity or failure to exhaust administrative or tribal remedies as defenses to any such declaratory or injunctive actions by Lessee, the Navajo Participants, or the Black Mesa and Lake Powell Railroad. During the pendency of any good faith challenge to such claim, neither Lessee, the Navajo Participants, nor the Black Mesa and Lake Powell Railroad shall be required to make payment of any amounts claimed due by the Navajo Tribe or its subordinate agencies or units in alleged violation of Navajo Lease Sections 7(e) and 7(f), except that if Lessee, the Navajo Participants, or the Black Mesa and Lake Powell Railroad decide to appeal an adverse decision of a challenge, such appealing party shall, within (30) days of such adverse decision, post a bond in favor of Lessor with an established financial institution reasonably acceptable to Lessor in an amount equal to the amount determined by an appealable judgment of the United States District Court or the decision of the Secretary of the Interior to be owing by such bonding

party to Lessor, each such bond to remain in force until the earlier of (i) a determination by a federal appellate court that the district Court's or Secretary's ruling as to the fact of the bonding party's liability to Lessor was erroneous; or (ii) payment to Lessor of the amounts claimed by Lessor. Nothing in this subparagraph (a) shall be interpreted as a consent to suit by the Navajo Tribe or its subordinate agencies or units to any challenge to the fact or amount of a Navajo tribe tax or other levy not alleged to be in violation of Navajo Lease Sections 7(e) and 7(f) except in accordance with the procedures specified under Navajo tribal law and by the Navajo Tax Commission.

(b) Except as provided in the Navajo Lease, in the Section 323 grants, and in Articles XXXIV and XXXV hereof, Lessee expressly acknowledges: (i) the right and authority of the Navajo Tribe to levy the Possessory Interest Tax and the Business Activity Tax on Lessee, as permitted by law, on the Lease Interests and Activities as defined in Article XXXV herein within the Navajo Reservation, excepting those areas designated as the Navajo Partitioned Lands of the Former Joint Use Area; and (ii) the right and authority of the Navajo Tribe to levy the Business Activity Tax on Lessee, as permitted by law, on the activities taking place on the surface areas within the Navajo Reservation designated as the Navajo Partitioned Lands of the Former Joint Use Area. These acknowledgments are based on the Navajo Tribe's ownership and control of surface and subsurface rights or other rights in the area described in subsection (i) hereof, and on the Navajo Tribe's ownership and control of surface rights in the area described in subsection (ii) hereof, and its exercise of territorial governance over both such areas.

These acknowledgments shall not be construed as recognition by Lessor or Lessee of any subsurface rights or other rights which the Hopi Tribe may have or assert in the Navajo Partitioned Lands of the Former Joint Use Area. Within thirty (30) calendar days of the effective date of these Lease amendments and consistently with the exceptions to the acknowledgments in the first section of this subsection (b), Lessee shall file tax returns and pay all Business Activity Tax and interest thereon for periods commencing on or after January 1, 1985, due from Lessee under Navajo tribal law based on the Lease Interest and Activities as defined in Article XXXV herein within the Navajo Partitioned Lands of the Former Joint Use Area. Provided such payment is made within such thirty (30) day period, Lessee shall not be obligated to pay penalties for non-payment of or non-filing of returns for such Business Activity Tax for the period from January 1, 1985 through the effective date hereof. Nothing in this article shall be construed as a waiver by Lessee, the Navajo Participants, or the Mohave Participants of the rights granted under this Article XXXIV or any other right to challenge the amount of the Business Activity Tax, or other fee, charge, assessment or similar exaction association therewith (or penalties or interest thereon) levied by the Navajo Tribe or its subordinate agencies or units.

(c) Lessor and its subordinate agencies and units consent to be sued by Lessee in the United States District Court for the District of Arizona for the limited purpose of securing such declaratory relief as may be necessary to ascertain Lessor's rights and authority to impose taxes, fees, or other charges other than the Business Activity Tax on the Lease Interests and

Activities as defined in Article XXXV herein in and on those areas designated as Navajo Partitioned Lands in the Former Joint Use Area. Lessor and its subordinate agencies and units further agree not to raise sovereign immunity or failure to exhaust administrative or tribal remedies as defenses to any such action by Lessee. Payment of prospective taxes due from Lessee to Lessor under Navajo tribal law, other than the Business Activity Tax, for Lease Interests and Activities within the Navajo Partitioned Lands of the Former Joint Use Area may be deferred by Lessee pending the entry of final judgment in the action for declaratory relief contemplated by this Article XXXIV(c), provided Lessee initiates such action within one hundred and eighty (180) days of the effective date of these Lease amendments; and provided further, within thirty (30) days of the effective date of these Lease amendments, Lessee arranges for and maintains a bond in favor of Lessor with an established financial institution reasonably acceptable to Lessor in an amount equal to the taxes (plus interest thereon as provided by Navajo tribal law) for which payment is deferred under this Article XXXIV(c). The amount of such bond shall be increased no less frequently than once every six (6) months after its establishment to reflect the balance of deferred taxes and interest at the end of each such six (6) month period, and the bond shall remain in effect until the earlier of (i) entry of a final judgment in such declaratory relief action declaring that none of the deferred taxes or interest thereon are due and owing to Lessor; or (ii) payment of such deferred taxes and interest to Lessor. Lessor may claim against such bond if payment of deferred taxes and interest is not made to Lessor within thirty (30) days of final judgment. Lessee shall be not be liable for nor be required to

make payment of any penalties or fees assessed for nonpayment or failure to file (except interest) in relation to such deferred taxes which may otherwise by applicable to the period from execution of these lease amendments until the final unappealable decision by the Federal Courts.

(d) The parties agree that in exchange for all benefits associated with these lease amendments and any amendments to Lease No. 14-20-0603-9910, Lessee, Black Mesa Pipeline, Inc., the Black Mesa and Lake Powell Railroad, and the Navajo and Mohave Participants are not liable for and will not be assessed for any taxes, assessments, fees, penalties, interest thereon, or similar exactions or charges of the Navajo Tribe, its subordinate agencies or units, regardless of when assessed, relating to or based upon any ownership, operations or leasehold or other interest of Lessee, Black Mesa Pipeline, Inc., the Black Mesa and Lake Powell Railroad, or the Navajo and Mohave Participants during periods prior to January 1, 1985. Lessee and Black Mesa Pipeline, Inc. shall not be liable for and will not be assessed or be required to make payment of penalties or fees for nonpayment or failure to file which may otherwise be applicable to the Possessory Interest Tax or the Business Activity Tax for the period from January 1, 1985 through the effective date of these Lease amendments, provided Lessee makes the Business Activity Tax payment required under Section XXXIV(b) herein. Until the effective date of these lease amendments or their rescission by either party pursuant to Article XXXII of these amendments, whichever occurs first, Lessor agrees to stay any requirement of payment, enforcement actions, subpoenas, liens, accrual of interest or penalties, and

the running of any time limits for the filing of any appeal or request for relief or other ruling with regard to any taxes, assessments, fees, penalties, interest thereon, or similar exactions or charges of the Navajo tribe or its subordinate agencies or units, regardless of when accessed, relating to or based upon any ownership, operation, or leasehold or other interest of Lessee, Black Mesa Pipeline, Inc., or the Black Mesa and Lake Powell Railroad, or the Navajo and Mohave Participants for tax periods prior to January 1, 1985.

10. A new Article XXXV shall be added as follows:

XXV. *Royalty-Tax Cap*

Lessor hereby covenants that, for any calendar year after 1984, the combined total collected, assessed, charged or otherwise sought to be collected by Lessor for the Royalty-Tax Cap Elements listed below shall not exceed twenty and one-half percent (20.5%) of the gross realization received by Lessee for coal from the leased premises during such calendar year from the purchaser of such coal in a bona fide arms length transaction. The twenty and one-half percent (20.5%) rate will be applied to gross realization on a per purchaser basis and not on a cumulative basis so that the total of Royalty-Tax Cap Elements related to coal purchased by a given buyer from the leased premises shall not exceed an amount equal to the gross realization received by Lessee from that buyer for such coal (computed in accordance with the method set forth in Article IV and Exhibit A-2 herein) multiplied by the percentage rate of the Royalty-Tax Cap, as set forth in Exhibit A-3. The Royalty-Tax Cap Elements shall consist of the following:

(a) Coal royalty payable by Lessee to Lessor pursuant to Article III of these amendments for the applicable calendar year as the result of the specific transaction for the sale and purchase of such coal; plus

(b) The total of all taxes, assessments, fees, or similar exactions or charges of the Navajo Tribe, its subordinate agencies and units, for the applicable calendar year, regardless of when assessed, relating to or based upon any ownership, operations or leasehold interest of Lessee, Black Mesa Pipeline, Inc., or other coal transporter, directly or indirectly associated with the specific transaction for the sale and purchase of such coal including, without limitation: the sale or delivery of such coal by Lessee and coal transporters, the severance or extraction of such coal by Lessee, this Lease as it relates to such coal or lands overlying it, the severance, extraction, diversion, or utilization of water from the leased premises by Lessee, Black Mesa Pipeline, Inc., or other coal transporter, in the mining or transportation of such coal, the property of Lessee, Black Mesa Pipeline, Inc., or other coal transporter located on lands leased hereunder and on other lands of the Navajo Tribe to the extent used to supply such coal to the coal purchaser, or rights-of-way granted by Lessor to Lessee, Black Mesa Pipeline, Inc., or other coal transporter to the extent used to supply such coal to the coal purchaser, any improvements or property located thereon, any slurry line, railroad, and related facilities used in the transportation of such coal, or the transportation of such coal (collectively referred to as "the Lease Interests and Activities"). Nothing contained in subparagraph (b) shall be construed to include within its scope any of the following:

(1) Water rates payable to Lessor under the amendments to Lease No. 14-20-0603-9910 or under any other lease or contract with the Navajo and/or Hopi Tribes;

(2) Royalties for uranium and other minerals payable to Lessor under Article IV of this Lease, as amended;

(3) Annual right of way or rent amounts payable hereunder or under separate agreement with Lessor, Black Mesa Pipeline, Inc. or other coal transporter;

(4) Bonuses payable to Lessor under Article XXXIII;

(5) Scholarship amounts payable under Article XXXI;

(6) Penalties, fines or interest thereon assessed by Lessor against Lessee, Black Mesa Pipeline, Inc., or other coal transporter for failure to comply with the terms of this Lease or other agreement(s) with Lessor, or with applicable laws or regulations;

(7) Taxes, fees, or assessments against Lessee, Black Mesa Pipeline, Inc. or other coal transporter for interests or activities not included in the Lease Interests and Activities.

(c) The royalties collectible hereunder are reduced to the extent, in any year, any amounts which would otherwise be collectible by the Navajo Tribe, its subordinate agencies and units, under the Royalty-Tax Cap elements described in subsections (a) and (b) above, are in excess of the percentage or gross realization herein provided, and collection of such amounts shall not be sought by the Navajo Tribe, its subordinate agencies and units. The excess amounts shall be credited to Lessee by deducting such amounts from the royalty amounts otherwise due to Lessor beginning with the monthly royalty payment made by Lessee after Lessee's payment in full of all taxes, assessments, fees and other similar exactions or charges for the applicable calendar year as assessed by Lessor or, where applicable, as finally adjudicated through available and proper administrative and judicial tribunals. However, in the event that such deductions from royalty amounts would reduce royalty to zero or to any level deemed unacceptable under federal requirements for production in paying quantities, such excess amounts shall be deducted from tax amounts otherwise due Lessor, its subordinate agencies or units, to the extent necessary to maintain the applicable Royalty-Tax Cap percentage while providing a level of royalty necessary under federal requirements for production in paying quantities. Nothing in this Article XXXV shall be construed as relieving or imposing additional obligations on Lessee, Black Mesa Pipeline, Inc., other coal transporters or any of the Navajo or Mohave Participants with regard to filing tax returns or providing to Lessor other information otherwise required under applicable Navajo tribal law. Lessee agrees to provide reasonable cooperation to Lessor, its subordinate agencies and units, in calculating deduction(s) credited to Lessee hereunder and reflecting such deductions(s) in the records of the Navajo Department of Natural Resources and the Navajo Tax Commission.

(4) Notwithstanding the foregoing, in the event (i) it is established by judicial decision binding on the

State of Arizona (the "State") or a valid act of the United State Congress or the State Legislature that the State is without authority to, or will not levy any or all State taxes against the property, interest or activities of Lessee, Black Mesa Pipeline, Inc. or other coal transporter described in Article XXXV(b) and the effect of such decision or act is to reduce taxes paid by Lessee, Black Mesa Pipeline, Inc. or other coal transporter to the State, and (ii) Lessor assesses taxes or similar exactions as substitute or replacement therefor, there shall be deducted from the Royalty-Tax Cap amount, which is calculated by adding the Royalty-Tax Cap Elements under articles XXXV(a) and (b), an amount equal to the lesser of eighty percent (80%) of such terminated State taxes otherwise assessable against Lessee, Black Mesa Pipeline, Inc. or other coal transporter, or eighty percent (80%) of the amount of such substitute or replacement taxes or exactions to be paid by Lessee, the Navajo Participants, Black Mesa Pipeline, Inc. or other coal transporter.

(e) Nine (9) months prior to the ten (10) year anniversary of the effective date of these amendments, and nine (9) months prior to each successive ten (10) year anniversary thereafter for the duration of the Lease term, the percentage rate of the Royalty-Tax Cap stated herein may reopen and Lessor and Lessee shall begin good faith negotiations to reach agreement on a percentage rate for the Royalty-Tax Cap for the succeeding ten (10) year period. If no agreement is reached within four (4) months, the issue of the percentage rate of the Royalty-Tax Cap may be taken to arbitration under the procedures provided in Article XXXVII herein for determination, consistent with the terms hereof, of an equitable percentage rate for the

Royalty-Tax Cap, considering the interests of Lessor, Lessee and the Navajo and Mohave Participants. The parties shall utilize their best efforts to complete the arbitration prior to the applicable ten (10) year anniversary date and shall direct the arbitrators to conduct the proceedings and render a decision prior to such anniversary date. However, the decision of the arbitrator or arbitrators in no case will result in a percentage rate for the Royalty-Tax Cap of less than twenty and one-half percent (20.5%) of gross realization. Any adjustment of the Royalty-Tax Cap as a result of arbitration shall be applicable from and after the later of either the date of the arbitration award or the applicable ten (10) year anniversary date.

In the event the parties fail to reach a negotiated agreement and elect to arbitrate both royalty rates and the Royalty-Tax Cap for a specific ten (10) year reopener under Article IV and XXXV, both such arbitrations shall be conducted as a single proceeding in accordance with the procedures set forth in Article XXXVII.

11. A new Article XXXVI shall be added as follows:

XXXVI. *Rights-of-Way*

Lessee may make application to Lessor for a permit or grant of any right-of-way reasonably related to Lessee's operations and located within the area designated on Exhibit A-4 attached hereto. Lessor will not unreasonable withhold its consent to any such right-of-way. Compensation to Lessor for such rights-of-way shall be negotiated between Lessor and Lessee, and the grant or permit of any right-of-way shall be in accordance with all provisions of applicable law, including federal and Navajo tribal law and regulations.

The Participants in the Navajo and Mohave Projects may from time to time apply for a permit or grant of rights-of-way to construct and operate facilities over, across or beneath Navajo Reservation lands not already under lease to such Participant or Participants. Lessor will grant approval of such permits or grants of right-of-way if Lessor, in its sole discretion, determines that such permits or rights-of-way should be granted, subject only to (i) review and approval in an expeditious manner of facility site or route selection by the appropriate tribal agency, and (ii) payment of a feed for said permit or grant or grant of right-of-way in accordance with the formulas established in Exhibit A-5 attached hereto.

12. A new article XXXVII shall be added as follows:

XXXVII. *Arbitration*

Whenever under the provisions of this Lease, as amended, arbitration is required to take place, it shall take place under the following procedures.

Unless, within thirty (30) days of the date arbitration is required to commence, the parties agree upon the appointment of a single arbitrator, a panel of arbitrators consisting of three (3) members shall be appointed as follows.

Within ten (10) working days from the end of the thirty (30) day period, one member shall be appointed by Lessor and one member shall be appointed by Lessee. The third member shall be selected by agreement of the other two members. In the event the two members cannot agree upon the third arbitrator within fifteen (15) working days from the end of the ten (10) day period, the third arbitrator shall be chosen by the Chief Judge of the United States District Court for

the District of Arizona or by the Regional Vice-President of the American Arbitratio. Association for Arizona, if the Chief Judge is unable or unwilling to select an arbitrator.

Expenses of arbitration shall be shared equally by Lessor and by Lessee. Meetings of the arbitrators may be in person or, in appropriate circumstances, by telephone. All decisions of the arbitration panel shall be by majority vote of the panel, shall be in writing and, together with any dissenting opinions, shall be delivered to Lessor and to Lessee. All decisions shall be made within four (4) months of the appointment of the arbitrator or arbitration panel, unless Lessor and Lessee agree on a longer period in writing.

The arbitrator or arbitration panel shall have power to administer oaths to witnesses, to take evidence under oath, and, by majority vote, to issue subpoenas to compel the attendance of employees and members of Lessor's tribe or employees of Lessee's company or for the production of books, records, documents and other relevant evidence by Lessor and Lessee.

The arbitrator or arbitration panel shall hold hearings in proceedings before it and shall give reasonable advance notice to Lessor and Lessee by registered mail not less than five (5) working days before any hearing. Appearance at a hearing waives such notice. Unless otherwise agreed by Lessor and Lessee, all hearings shall be held in Phoenix, Arizona, and, where evidence is taken, held on the record. The arbitrator or arbitration panel may hear and determine the controversy only upon evidence produced before it and may determine the controversy notwithstanding the failure of either Lessor and Lessee duly notified to

appear. The Lessor and Lessee is each entitled to be heard at all hearings, to present evidence material to the matter subject to arbitration, to cross-examine witnesses appearing at the hearing, and to be represented by counsel at its own expense. A transcript shall be kept of all proceedings before the arbitrator or arbitration panel. Except as necessary for the enforcement or appeal of the arbitration decision, the parties and arbitrator or arbitration panel shall maintain the confidentiality of any such transcript.

The decision of the arbitrator or arbitration panel shall be limited to establishing the mineral royalty rates or royalty-tax cap rates or resolving disputes arising under Article XI, shall be presumed to be valid, and may be vacated only by the United States District Court for the District of Arizona on one of the following grounds: (a) the decision was procured by corruption, fraud or undue means; (b) there was evidence partiality or corruption by the arbitrator, arbitration panel or by any member; (c) the arbitrator, arbitration panel, or any member was guilty of misconduct in refusing to hear the question or in refusing to hear evidence pertinent and material to the question, or any other clear misbehavior by which the rights of either party have been substantially prejudiced; (d) the arbitrator, arbitration panel, or any member exceeded their authority under the terms of this Lease as amended; or (e) the arbitrator or arbitration panel's decision is contrary to law. Lessor and its officers acting in their official capacity consent to suit in the United States District Court for the District of Arizona for the limited purpose of the enforcement or appeal of any arbitration decision pursuant to this Article, and agree no to raise sovereign immunity or exhaustion of tribal remedies as

a defense to such a suit. Arbitration awards shall be effective on the date of the arbitration decision. Sums due shall accrue interest from the date of the arbitration award at the prime rate then charged by the Bank of America or its successor.

13. A new Article XXXVIII shall be added as follows:

XXXVIII. *Third Party Beneficiaries*

The Navajo Participants and the Mohave Participants, their successors and assigns, are intended third party beneficiaries of those provisions of Article XI, XXXIV, and XXXVI herein which grant rights to such Participants for the sole and limited purpose of preserving and enforcing those rights in administrative proceedings or judicial proceedings for declaratory and injunctive relief in the event of an alleged breach by Lessor of the terms hereof. Except as set forth above, nothing in this Lease shall be construed as granting the Navajo Participants or Mohave Participants, or any one of them, any rights of approval to changes in this Lease, right to participate as a party to litigation of dispute or arbitration under this Lease or any other right hereunder.

14. A New Article XXXXIX shall be added as follows:

XXXIX. *Validity of Amended Leases*

Lessor and Lessee recognize Lease No. 14-20-0603-8580, as herein amended, to be valid and enforceable and in the best interests of Lessee and Lessor and its people. Lessor and Lessee hereby reaffirm their prior contractual commitments to provide for the compensation of individual Navajo tribal members for damages to improvements and

customary use rights in areas affected by mining operations authorized hereunder. However, subject to the requirement that Lessee meet its existing contractual obligations for such compensation, Lessor shall not, in either its governmental or proprietary capacity, take any action which would empower such tribal members, by virtue of their ownership of improvements or customary use rights, to prevent Lessee from exercising its rights granted under this Lease as herein amended.

15. A new Article XL shall be added as follows:

XL. *Lease to Continue in Effect Except as Expressly Modified*

Except as expressly modified by these amendments, the original Lease and all its provisions shall continue in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these lease amendments to be signed by their duly authorized officers on the dates written below.

THE NAVAJOR TRIBE, Lessor

11/20/87 — By [Illegible]
Date — Peter MacDonald, Chairman

The Navajo Tribal Council

PEABODY COAL COMPANY, Lessee

11/20/87 — By /s/ Kenneth R. Moore
Date — Vice President

Attest:

[Illegible]
Assistant Secretary

ACKNOWLEDGMENT OF LESSOR

State of Arizona)
)ss.
County of Maricopa)

Before me, a Notary Public, on this 20th day of November, 1987, personally appeared PETER MACDONALD, to me known to be the identical person who executed the within and foregoing lease amendments and acknowledged to me that he executed the same in his official capacity as Chairman of the Navajo Tribal Council for and on behalf of the Navajo Tribe of Indians as its free and voluntary act and deed for the uses and purposes therein set forth.

/s/ Carolyn Ann Jagger
Notary Public

My commission expires:
My Commission Expires May 31st, 1990.

ACKNOWLEDGMENT OF LESSEE

State of Arizona)
)ss.
County of Maricopa)

On this 20th day of November, 1987 before me appeared Kenneth R. Moore and Gregory J. Leisse, to me personally known, who being by me duly sworn, did

say that they are Vice President and Assistant Secretary of Peabody Coal Company, and that the seal affixed to the foregoing instrument is the corporation seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and said Kenneth R. Moore and Gregory J. Leisse acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and seal the day and year first above written.

/s/ Carolyn Ann Jagger
Notary Public

My Commission expires:
My Commission Expires May 31st, 1990.

LIST OF EXHIBITS

Lease No. 14-20-0603-8580

Amendments

A-1	Map of additional coal mining areas
A-2	Method of calculating gross realization and 5% limiter
A-3	Method of calculating Royalty -Tax Cap
A-4	Map of Peabody right-of-way area
A-5	Participants' right-of-way formula

ADDITIONAL RESERVE AREAS

Mining Area	Surface Acres
J-2	344.0
J-4	207.0
J-5	139.0
J-6	181.0
J-7 (Remainder)	251.0
J-8	264.0
J-9	309.0
J-10	236.0
J-13	90.0
J-14	454.0
J-15	490.0
J-23	3534.0
J-28	514.0
N-9	1610.0
N-14 West	108.0
TOTAL	8731.0

ROYALTY CALCULATION

I. CURRENT METHOD

The current method utilized by Lessee for computing royalties and gross realization for this lease is based on the U. S. Government's method applicable to federal coal leases as of May 1, 1987 and is as follows:

	per contract ton[1]
Lessee's revenues on tons sold to one purchaser F.O.B. mine	$13.134
SMCRA fees[2]	.356
Black Lung taxes	.550
Indian taxes (where applicable)	.746
Royalties[3]	2.188
Arizona taxes (including preparer's credit)	.526
Gross Realization[4 5]	$ 17.500

NOTES:

(1) Contract tons at a fixed 10.74% moisture content are the basis for the per ton prices used in Lessee's invoices.

(2) SMCRA fees of $.35 per ton are paid on "scale tons"; i.e., tons at actual moisture content when the coal is weighed (usually about 12%). These fees are slightly higher than $.35 on a per contract ton basis.

(3) For the illustrative purposes of this Exhibit, a royalty rate of 12.5% is used which reflects the initial royalty rate to be paid to the Navajo Tribe under the amendments to Lease No. 14-20-0603-8580 and also reflects the combined total of the 6.25% initial royalty rate to be paid to the Navajo Tribe under the amendments to Lease No. 14- 20-0603-9910 and the 6.25% initial royalty rate to be paid to the Hopi Tribe under the amendments to Lease No. 14-20-0450-5743.

(4) Gross Realization does not include transportation, but does include take or pay and is computed based on F.O.B. mines. Inclusion of extraordinary force majeure type payments to be determined through resolution of pending audit exceptions.

(5) Gross Realization normally varies from month to month due to changes in the individual components which in the aggregate add up to Gross Realization. Such changes in the value of individual components are merely price changes and do not constitute a change in the Federal Formula. For example, if SMCRA fees and Black Lung

taxes were doubled from $.906 to $1.812 per ton, this would not constitute a change in the Federal Formula. This change would therefore directly increase Gross Realization, taxes, and royalties.

II. GENERAL DESCRIPTION OF FIVE PERCENT LIMITATION CALCULATION

Gross realization will change no more than five percent (5.0%) for any change in the "Federal Formula", i.e. the Federal royalty regulations defining gross realization. For example, if the Federal Formula is revised so that SMCRA fees and Black Lung taxes are no longer included in gross realization, then the following test is triggered and the test will be performed each month thereafter.

1. Gross Realization

   (SMCRA fees)

   (Black Lung tax)

   Adjusted Gross Realization

2. Check for ± 5% Gross Realization:

   Adjusted Gross Realization ÷ Gross Realization = Percentage

3. If the percentage is less than or equal to 105% and greater than or equal to 95% of the gross realization before the change in the Federal Formula, then the "Adjusted Gross Realization for Royalty Calculations" will be the gross realization increased or reduced by the full impact of the change in the Federal Formula.

4. If the percentage is greater than 105% or less than 95%, then the Adjusted Gross Realization for Royalty Calculations is no more than 105% or

no less than 95% of the Gross Realization before the change in the Federal Formula.

III. PEABODY'S INVOICE CALCULATION

Peabody's invoice calculations to implement the ± 5% limitation are shown below:

A. Old Method:	Per Ton
Lessee's revenues on tons sold to one purchaser before Arizona taxes and royalties for one purchaser:	$14.786
Royalties @ 12.5%	2.188
	16.974
Arizona taxes @ 3.125% (including preparer's credit)	.526
Gross Realization (1)	$17.500

B. New Method (based on a change in the Federal Formula deleting SMCRA fees and Black Lung taxes of $.90 per ton):

1) Gross Realization old method	$17.500
Change in Federal Formula	(.900)
Adjusted Gross Realization	$16.600

2) Check for ± 5% limitation $16.600 ÷ $17.500 = 94.857%

3) Since 94.857% is less than 95%, the lower limit of 95% prevails

4) 95% of $17.500 or $16.625 becomes the "Adjusted Gross Realization for Royalty Calculations."

5) Royalties are $16.625 x 12.5% =	$2.078

C. Peabody's invoice for one purchaser:	Per Ton
Lessee's revenues on tons sold to one purchaser before Arizona taxes and royalties for one purchaser:	$14.784[3]
Royalties @ 12.5%	2.078
	16.862
Arizona taxes @ 3.125% (including preparer's credit)	.523
Gross Realization As Invoiced	$ 17.385[2]

NOTES:

(1) The $17.500 is the "Gross Realization before a change in the Federal Formula".

(2) The $17.385 is the "As Invoiced" price.

(3) Lessee's revenues on tons sold to one purchaser may change due to coal quality premium/penalties being based on gross realization. In this example, revenues decreased by $0.002 per ton.

IV. SPECIFIC EXAMPLES OF THE FIVE PERCENT LIMITATION CALCULATION

EXAMPLE 1:

Modification to Federal Formula adding $.90 per ton to gross realization:

Gross realization before change	$18.500
Increase in Federal Formula	.900
Adjusted Gross Realization for Royalty Calculations	$19.400

$19.40 ÷ $18.50 = 1.0486

Conclusion: Since 1.0486 is less than or equal to 105%, the Adjusted Gross Realization for Royalty Calculations will be the amount reflecting the full impact of the $.90 increase in the Federal Formula or $19.40.

EXAMPLE 2:

Modification to Federal Formula removing SMCRA fees and Black Lung taxes of $.90 per ton from gross realization:

Gross realization before change	$18.500
Reduction in Federal Formula	(.900)
Adjusted Gross Realization for Royalty Calculations	$17.600

$17.60 ÷ $18.50 = .9514

Conclusion: Since .9514 is greater than or equal to 95%, the Adjusted Gross Realization for Royalty Calculations will be the amount reflecting the full impact of the $.90 reduction in the Federal Formula or $17.60.

EXAMPLE 3:

After modification to the Federal Formula removing SMCRA fees and Black Lung taxes of $.90 per ton posited in Example 2, the gross realization drops from $18.50 to $17.50.

New gross realization	$17.500
Reduction in Federal Formula	(.900)
Adjusted Gross Realization for Royalty Calculations	$16.600

$16.60 ÷ $17.50 = .9486

Conclusion: Since .9486 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $17.50 or $16.625.

EXAMPLE 4:

After modification to the Federal Formula removing SMCRA fees and Black Lung tax from gross realization, supposed SMCRA fees and Black Lung tax have

increased to $1.25 per ton from $.90 per ton and gross realization increases from $17.50 posited in Example 3 to $18.25.

New gross realization	$18.250
Reduction in Federal Formula	(1.250)
Adjusted Gross Realization for Royalty Calculations	$17.000

$17.00 ÷ $18.25 = .9315

Conclusion: Since the .9315 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $18.25 or $17.338.

EXAMPLE 5:

Example 5 is a continuation of Example 4. Two changes in the Federal Formula have occured. The first is the one posited in Example 4: SMCRA fees and Black Lung tax are still excluded and are still $1.25. The second change in the Federal Formula excludes an item that is valued at $.60 (for illustration purposes, we'll call it Arizona sales tax). Also, Gross Realization is now $18.75.

1) New gross realization	$18.750
Reduction in Federal Formula resulting from the first change	(1.250)

Adjusted Gross Realization for Royalty Calculations	$17.500

$17.50 ÷ $18.75 = .9333

Conclusion: Since the .9333 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $18.75 or $17.813.

2) Gross realization before calculating impact of second Federal Formula change	$17.500
Reduction in Federal Formula resulting from second change	(.600)
Adjusted Gross Realization for Royalty Calculations	$16.900

$16.90 ÷ $17.813 = .9487

Conclusion: Since the .9487 is less than 95%, the adjusted gross realization for royalty calculations will be limited to 95% of $17.813 or $16.922.

EXAMPLE 6:

Example 6 is a continuation of Example 5. The Federal Formula is changed for a third time, this time to exclude an item valued at $2.00. Everything else remains the same as in Example 5:

1) New gross realization $18.750

Reduction in Federal Formula resulting from the first change (1.250)

Adjusted Gross Realization for Royalty Calculations $17.500

$17.50 ÷ $18.75 = .9333

.9333 is less than 95%, so limit = $17.813 (.95 X $18.75)

2) Gross realization before calculating impact of second Federal Formula change $17.500

Reduction in Federal Formula resulting from the second change (.600)

Adjusted Gross Realization for Royalty Calculations $16.900

$16.90 ÷ $17.813 = .9487

.9487 is less than 95% so limit = $ 16.922 (.95 X $17,813)

3) Gross realization before calculating impact of third Federal Formula change $16.900

Reduction in Federal Formula resulting from the third change (2.000)

Adjusted Gross Realization for Royalty Calculations $14.900

$14.90 ÷ $16.922 = .8805

.8805 is less than 95% so limit = $16.076 (.95 X $16.922)

EXAMPLE 7:

Example 7 is a continuation of Example 6. The Federal Formula is changed, for the fourth time, this time to include an additional item valued at $3.00 Everything else remains the same as in Example 6:

1) Gross realization $18.750

Reduction in Federal Formula resulting from the first change (1.250)

Adjusted Gross Realization for Royalty Calculations $17.500

$17.50 ÷ $18.75 = .9333

.9333 is less than 95%, so limit = $17.813 (.95 X $18.75)

2) Gross realization before calculating impact of second Federal Formula change $17.500

Reduction in Federal Formula resulting from the second change (.600)

Adjusted Gross Realization for Royalty Calculations $16.900

$16.90 ÷ $17.813 = .9487

.9487 is less than 95% so limit = $16.922 (.95 x $17.813)

3) Gross realization before calculating impact of third Federal Formula change $16.900

Reduction in Federal resulting from the third change (2.000)

Adjusted Gross Realization for Royalty Calculations $14.900

$14.90 ÷ $16.922 = .8805

.8805 is less than 95% so limit = $16.076 (.95 x $16.922)

4) Gross realization before calculating impact of fourth Federal Formula change $14.900

Increase in Federal Formula resulting from the fourth change 3.000

Adjusted Gross Realization for Royalty Calculations $17.900

$17.90 ÷ $16.076 = 1.1135

Conclusion: Since the 1.1135 is greater than 105%, the adjusted gross realization for royalty calculations will be limited to 105% of $16.076 or $16.880.

EXAMPLE 8:

The Federal Formula is changed, again on four separate occasions, this time all changes are additional items. The approach remains the same as Example 7:

1) Gross realization $18.750

Increase in Federal Formula resulting from the first change 1.000

Adjusted Gross Realization for Royalty Calculations $19.750

$19.75 ÷ $18.75 = 1.053

1.053 is greater than 105%, so limit = $19.688 (1.05 x $18.75)

2) Gross realization before calculating impact of second Federal Formula change $19.750

Increase in Federal Formula resulting from the second change 3.000

Adjusted Gross Realization for Royalty Calculations $22.750

$22.75 ÷ $19.688 = 1.156

1.156 is greater than 105% so limit = 20.675 (1.05 x $19.69)

3) Gross realization before calculating impact of third Federal Formula change $22.750
Increase in Federal Formula resulting from the third change .850

Adjusted Gross Realization for Royalty Calculations $23.600

$23.60 ÷ $20.675 = 1.141

1.141 is greater than 105% so limit = 21.704 (1.05 X $20.67)

4) Gross realization before calculating impact of fourth Federal Formula change $23.600

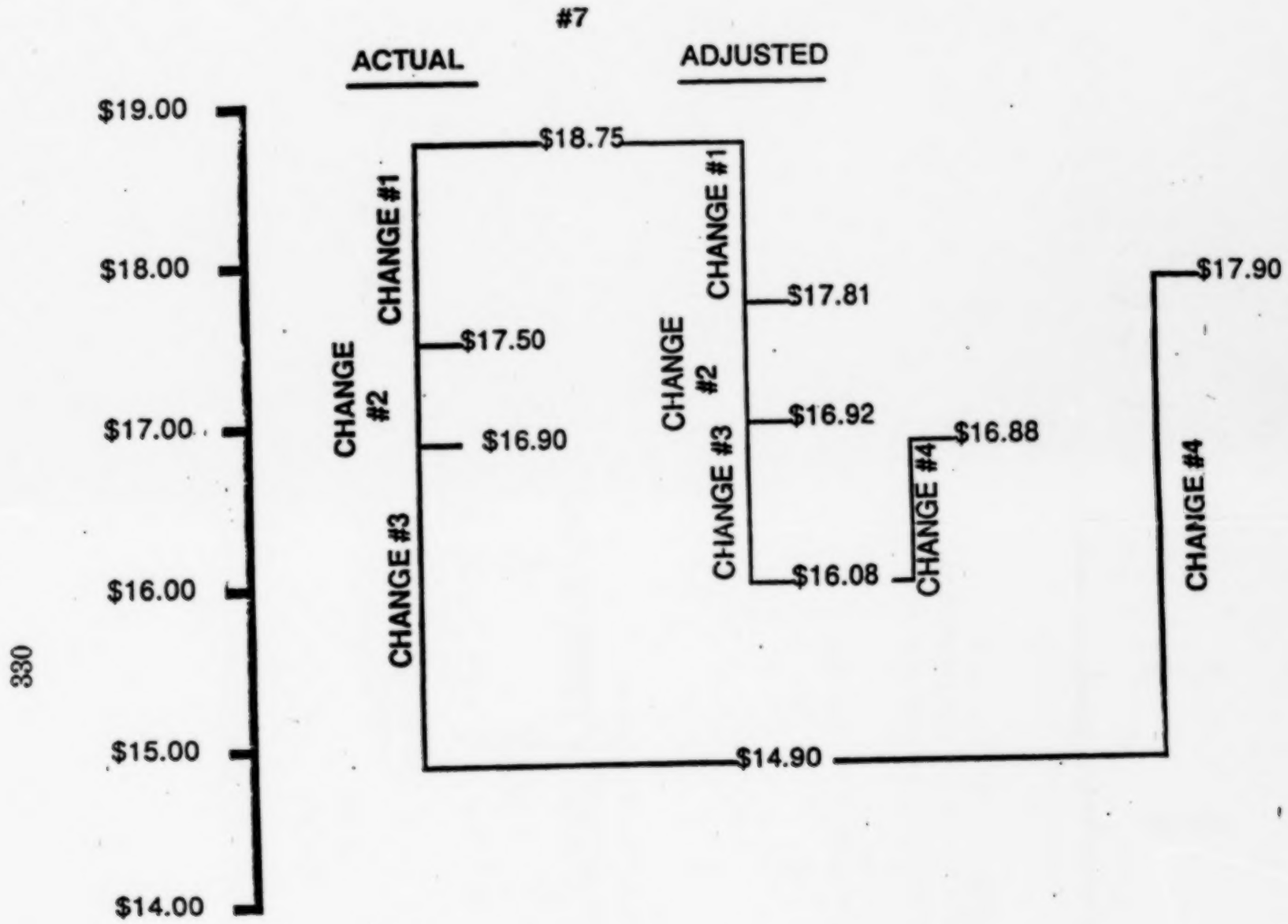
Increase in Federal Formula resulting from the fourth change 1.250

Adjusted Gross Realization for Royalty Calculations $24.850

$24.85 ÷ $21.704 = 1.145

Conclusion: Since the 1.145 is greater than 105%, the adjusted gross realization for royalty calculations will be limited to 105% of $21.71 or $22.795.

GRAPHICAL PRESENTATION OF EXAMPLES 7 & 8



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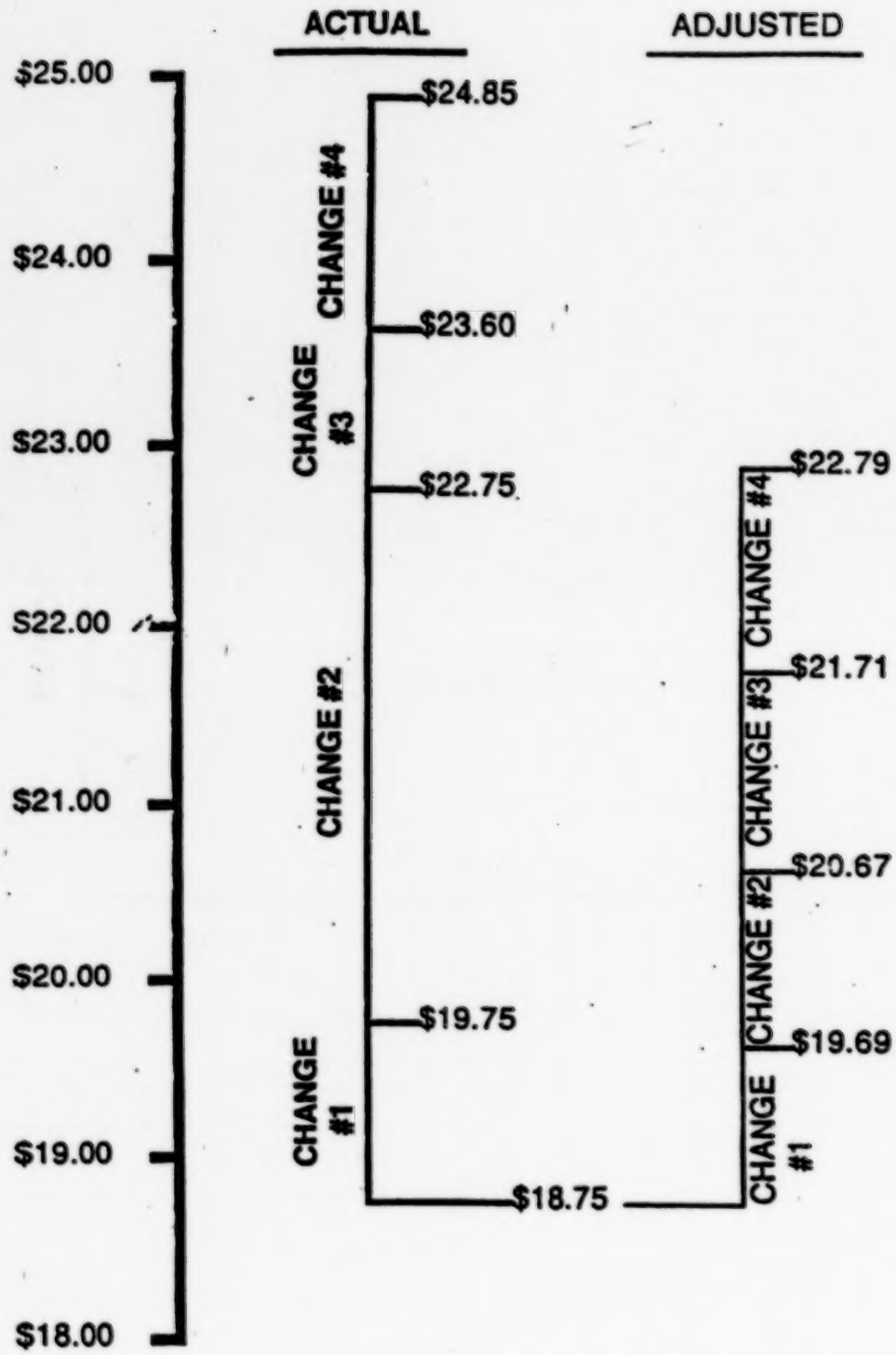
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CHANGE #2
CHANGE #1

LEASE NO. 14-20-0603-8580

ROYALTY-TAX CAP[1]

Example I

Royalty Element Article XXXV(a)		$6,803,299
Tax Element Article XXXV(b):		
Peabody Coal	3,507,600	
Transporter	75,000	
		3,582,600
Total Royalty/Tax Elements		$10,385,899

$$\frac{\text{Royalty/Tax Elements } \$10{,}385{,}899^{[2]}}{\text{Gross Realization } \$54{,}426{,}393^{[3]}} = 19.08\%$$

Since the actual Navajo Royalty - Tax Percentage of 19.08% is less than the Royalty - Tax Cap of 20.50%, no adjustment needs to be made for this calendar year.

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculations," as defined in Exhibit A-2.

LEASE NO. 14-20-0603-8580

ROYALTY-TAX CAP[1]

Example II

Royalty Element Article XXXV(a)		$6,803,299
Tax Element Article XXXV(b):		
Peabody Coal	5,261,400	
Transporter	112,500	
		5,373,900
Total Royalty/Tax Elements		$12,177,199

$$\frac{\text{Royalty/Tax Elements } \$12{,}177{,}199^{(2)}}{\text{Gross Realization } \$54{,}426{,}393^{(3)}} = 22.37\%$$

SINCE 22.37% is greater than 20.5% THEN

1) Reduce subsequent royalty payment by the excess amount.
2) Reduce subsequent BAT payment by the remaining excess amount.

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculation," as defined in Exhibit A-2.

3) Reduce subsequent PIT payment by the remaining excess amount.
4) Reduce subsequent payment of other Indian Taxes by the remaining excess amount.

I.E.

20.5% of $54,426,393	$11,157,401	Royalty Payment	$6,803,299
Total Royalty/Tax Elements	12,177,199	Less: Excess Amount	1,019,789
Excess Amount	$1,019,789	Revised Royalties	$5,783,510

NOTES:

(1) This calculation will be done for each purchaser for each calendar year after 1984.

(2) For the purpose of applying the Royalty-Tax Cap, royalties and taxes shall be those royalties and taxes recorded on Lessee's books for each calendar year using accrual basis accounting.

(3) Gross realization will be based on the annual "Adjusted Gross Realization for Royalty Calculation," as defined in Exhibit A-2.

TRIBAL RESOLUTION

FORMULA FOR PARTICIPANTS' RIGHTS-OF-WAY

(a) For each such right-of-way or easement, Applicant shall pay the Secretary for the use and benefit of the Tribe a one-time payment computed on the basis of the following formula:

$$Ra1 = (R1) \times \frac{(Ic1)}{(Ib1)}$$ WHEREIN:

Ra1 = The adjusted one-time payment for such right-of-way or easement.

R1 = The product of (a) the number of acres in the right-of-way or easement and (b) $200 per acre.

Icl = The final quarterly index of the Index of Implicit Price Deflators for Gross National Product (as presently published in Table 7.1-7.2 of the National Income and Product Tables, in publication by the United States Department of Commerce entitled Survey of Current Business, hereinafter referred to as ("IPD") last published immediately preceding the date of the grant of the right-of-way or easement is effective, provided that in no event shall Ic1 by less than the value of Ib1.

Ib1 = The final quarterly index of IPD last published before April 25, 1985.

(b) In addition to the payments set forth in (a) hereof, as consideration for each such right-of-way or easement, Applicant shall pay the Secretary for the use and benefit of the Tribe an annually adjusted payment

of $10 per acre. The payment shall be calculated on the basis of the following formula:

$$Ra2 = \frac{(Ic1)}{(Ib2)} \times \$10$$ WHEREIN:

Ra2 = The adjusted annual payment for each acre.

Ic2 = The final quarterly index of IPD last published preceding the date each annual payment is due, provided that in no event shall Ic2 Be less than the value of Ib2.

Ib2 = The final quarterly index of IPD last published before April 25, 1985.

The foregoing formula shall not apply to renewals of or to rights-of-way or easements for which application was submitted to the Tribe before the effective date of the subject amendments, nor to any rights-of-way or easements for which application is made by an entity, or joint venture project which will wholly own the transmission lines for which the application is made, and in which the Tribe, its political subdivisions, or its enterprises have an ownership interest.

[Seal Omitted]

THE SECRETARY OF THE INTERIOR
WASHINGTON

SECRETARIAL APPROVAL

Based upon a review of all the terms of the amendments to Navajo-Peabody Coal Lease Numbers 14-20-0603-8580 and 14-20-0603-9910, and Hopi-Peabody Coal Lease Number 14-20-0450-5743, I find the amendments, subject to the following clarifications, findings, and condition, are in the two Tribes' best interests and do hereby approve said amendments.

Assignments

The advance assignment provision is approved. However, any future assignee must satisfy all other requirements of 25 CFR §211.26(a), including notice to the Secretary and the posting of a satisfactory bond at the time of assignment.

Rights-of-Way

Lessee must apply to the Secretary and obtain all off-lease rights-of-way on tribal lands pursuant to 25 U.S.C. §323 and the implementing regulations at 25 CFR Part 169.

Partition of the Former "Joint Use" Lands Requirement

I find that the lease amendments are substantially equivalent in what each Tribe will receive under its respective lease, taking into account the overall transaction.

Negotiation Requirement of 25 CFR §211.2

Without determining whether this regulation is applicable under these circumstances, I do hereby ratify the prior consent to negotiate given by the respective Area Directors and the Office of the Assistant Secretary - Indian Affairs.

Resolution of Outstanding Peabody Appeal

With the approval of these lease amendments, I direct the Assistant Secretary - Indian Affairs to dismiss Peabody Coal Company's appeal of the June 18, 1984, decision of the Bureau of Indian Affairs' Navajo Area Director readjusting the royalty rate to Navajo-Peabody Lease No. 14-20-0603-8580.

Documents to be Supplied by Lessee

Approval of the lease amendments shall not relieve lessee from any of its current duties to provide documentation and information to the Government.

NEPA

Based upon the Environmental Assessment and the Finding of No Significant Impact approved by the Assistant Secretary - Indian Affairs dated December 9, 1987 covering these lease amendments, the mining of additional coal dedicated to the leases by the amendments will not take place until the necessary NEPA

review(s), as required by law, is triggered and appropriate action taken upon the submission of a revised mine plan(s) to cover the additional coal dedicated by the lease amendments.

Executed this the 14th day of December, 1987.

/s/ DONALD PAUL HODEL
DONALD PAUL HODEL

UNITED STATES COURT OF FEDERAL CLAIMS

No. 93-763L

NAVAJO NATION, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Scottsdale, Arizona
June 11, 1997

DEPOSITION OF HONORABLE MICHAEL C. NELSON

Prepare for:
THE COURT
(ORIGINAL)

Prepared by:
Deanna V. Pappas, RPR

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* * * * *

Q. Would you please state your name?

A. Michael C. Nelson

Q. And what is your business or profession, sir?

A. I'm presiding judge of the Apache County Superior Court.

* * * * *

Go ahead, sir.

A. I went to the University of Arizona Law School. I graduated in 1977. I went to work for DNA Legal Services in Window Rock, Arizona immediately upon graduating from law school.

Q. Okay.

A. I worked in the Fort Defiance office of DNA until, let's see—I thing it was '79.

Q. Two years?

A. Yes. An then from '79 to '82, I worked in the litigation and research unit. '83, actually, beginning of '83. I worked in the litigation and research unit of DNA, People's Legal Services, also in Window Rock. '83—it was April, I believe, of '83, I went to work in the Office of the Chairman of the Navajo Tribal Council. I worked there—

Q. Who was that at that time?

A. Mr. Zah was chairman then. He had been elected in November of '82, and he was inaugurated in January of '83.

Q. Okay, sir. Go ahead.

A. I worked at—my title was special staff assistant when I began working in his office. That shifted to counsel to the Chairman about two years later. I couldn't say exactly when that happened, sometime in '85. And then I worked in that capacity until January '87, when Chairman Zah left office. And I went into private practice.

Q. You went into private practice?

A. For a little over two years.

And then in March of '89, I was appointed by Governor Mofford to fill a vacancy in the position of

presiding judge of the Apache County Superior Court, and I've been there since.

* * * * *

Q. That's correct.

Do you—in view of what you've said, do you recall that, that, ultimately, a, a—do you recall hearing anything about a possible decision from the Department of the Interior on Peabody's appeal?

A. What I remember about this was that somehow we got word that Interior wanted us to attempt to, to go forward with the negotiations, and that was really when I got involved in it.

Q. You hadn't been involved in it up to that point at all?

A. No, no. That was—the status of negotiations were, were, they were at an impasse with the lease renegotiation team. We had word from Washington they wanted us to, to give it another shot. And that was my instruction from Chairman Zah, to see what was going on and give it another shot.

Q. So this would have been in '85?

A. I think so.

Q. You think so?

A. I think so.

Q. What, what—how did the communication come from—you said—I think you said Washington.

A. Uh-huh.

Q. Do you recall from whom in Washington?

A. I don't.

Q. Or what the medium of the message was?

A. I've thought about this since this particular issue came up. I tried to remember. I remember sitting in a meeting with Department of Justice representatives and the Attorney General's Office discussing—

Q. Navajo Department of Justice?

A. Yes, that's Navajo Department of Justice.

—and being—we were discussing the situation. And I was told that a letter was coming that, you know, that would formally say all this; that there would not be a decision made, but that they wanted us to try lease negotiations once again.

I don't recall ever seeing a letter like that. You know, my, my impression was that it was coming. I don't know that it ever did

Q. Who, who was, who was present at this meeting?

A. I believe Claudeen Arthur was the Attorney General, and Oscar Mason was head of Minerals, and I thing Elizabeth Bernstein, who was—worked with the tax commissions. She was an attorney that worked with the tax commissions.

Q. Elizabeth Bernstein?

A. I think.

Q. Is that B-e-r-n-s-t-i-e-n?

A. Yes. S-t-e-i-n, I believe.

Q. E-i-n, yes.

So you don't recall any information about how they had—

A. Found this out?

Q. —from whom they had received this information?

A. No. I really don't recall.

Q. Or whether it had been directly given to them, or perhaps someone else, the Chairman or someone else?

A. No. I really don't recall.

Q. Okay. Do you recall ever seeing in draft or other form any, any, any writing that might have been a prospective decision from the Department of the Interior?

A. No.

(Defense Exhibit No. 2 was marked for identification by Mr. Rogers.)

Q. BY MR. ROGERS: Let me show you what I'll mark as Defense Exhibit 2 and ask you to just glance over it a moment. I will tell you—I might even direct your attention to the last page, which sums up where it was going. Not the last—this is the wrong copy?

A. Page 6?

MR. FRYE: Uh-huh.

Q. BY MR. ROGERS: I have two copies of the same thing. Yes, primarily the last paragraph and the signature block.

Do you recall ever seeing this document or—

A. No.

(Defense Exhibit No. 3 was marked for identification by Mr. Rogers.)

Q. BY MR. ROGERS: Okay. I don't—I will do it for the record, but it's essentially the same. I'll show you what I've marked as Defense Exhibit 3. I will tell you that this is essentially the same letter with some minor exceptions. It's got a notation at the top in handwriting, and—

Did I give you one?

MR. FRYE: Not yet.

MR. BELLIS: Thanks.

MR. ROGERS: 3.

Q. It remains unsigned, and it has an additional —at the last two pages, the last page—next to the last page has a new ultimate paragraph.

I'd just ask you if you've—this is a slightly different version. Do you recall seeing it?

A. No.

Q. Okay. Or hearing about it?

I think, before, you said you didn't, but . . .

A. I don't recall hearing about it.

Q. Okay.

A. I would just like to take a minute.

Q. Oh, please do.

A. I find it curious to see what they said. Okay.

* * * * *

Q. What can you tell us about how the, the royalty tax cap evolved in the final agreement? Do you recall there was a royalty tax cap in the final agreement?

A. I do.

Q. Do you remember what it was?

A. Twenty and a half percent, I believe.

Q. Twelve and a half percent royalty and—

A. Eight percent—

Q. —eight percent taxes?

A. That's how it evolved.

Peabody was not willing to pay more than twelve and a half percent royalty rate, and I believe eight percent was the current tax rate that we, we had imposed for the P.I.T. and the B.A.T. Because that's where the interest tax and business activity tax—so that's where it came from. That's where the number came from.

Q. Now, the twenty and a half percent total is, at least as a number, is, is a pretty close approximation, in fact, a slight excess over the twenty percent royalty. What was the Tribe's view, as you recall it, as to whether or not they got this additional income by way of either royalty or taxes?

Did they, did they really distinguish? Did the Navajo position really distinguish, or were they satisfied that they were getting approximately the same amount of revenue?

MR. FREYE: Can I ask for clarification? Who are you saying when you say "they"?

MR. ROGERS: The Navajo position.

THE WITNESS: That's the same question I have when you ask me that question.

It really depends on who you're talking to. If I talk to the tax commission, they'll scream bloody murder about this kind of limitation. If I talk to minerals, they'll be unhappy about this limitation. If I talk to the financial people—and to them, twenty percent is twenty percent. So it really depends on who, who you're talking about.

Q. BY MR. ROGERS: Is that because the money basically goes into different pockets in the Navajo government?

A. No. Actually, it goes into the general fund. It makes no difference as far as where it goes. It's the people's own perception of what's important to them.

Q. Why, why is it—what makes it important to the tax commission?

A. Well, it is a limitation on taxes.

Q. Just because of the limitation?

A. Right. Because there is a cap, they can't raise their taxes.

Q. Okay.

A. And they, they were very much opposed to that.

Q. So it's not a question of affecting revenue. It's a question of limiting future taxes, at least on this particular entity?

A. Well, it would have affected revenue, too. If they could raise the tax rate, it would have increased the revenues.

Q. Okay. I'm sorry. Assuming, assuming that the, that the taxes were not ever going to exceed eight percent—

A. Uh-huh.

Q. —without being limited by contract, the amount of revenue wouldn't make any difference to, to the tax commission or the Tribe whether it came in by royalty or by tax?

A. I suppose that's true.

Well, we would have been looking at twenty percent on the north lease, twenty percent royalty, plus eight percent tax. So it would have been twenty-eight rather than twenty.

Q. Okay.

A. So there—you know, there is a difference as far as the rent, the royalty, the revenue that we would receive.

Q. With that background and important clarification then, what—how did, how did the politics of it work out in terms of the Navajo finally coming around and agreeing to the twenty and a half percent royalty tax cap? How was that, how was that series of, of discussions within the Tribe resolved within the Tribe?

A. Well, the reason we ultimately agreed to the cap, it revolved around a number of considerations. First, we didn't have the twenty percent on the north lease. We had an interim decision sort of. We had this thing from Donald Dodge, apparently, that said twenty percent. We didn't have final agency action—

Q. Right.

A. —setting it. So it, it was not firm.

There was some question—let me see if I can remember this. There were some questions about

effective date of the taxes. There were some questions about imposition of tax prior to the Kerr-McGee decision, whether notice had been sent and whether Peabody had a chance to contest their valuations, things like that that went to back taxes, not to taxes from here forward.

* * * * *

THE WITNESS: Well, there other things that we felt we were getting out of it that we would not have gotten out of it.

Q. BY MR. ROGERS: A straight royalty adjustment?

A. A straight royalty adjustment on the north side lease.

The big one is that the royalty rate on the south lease was going up, too, and we would have had a great deal of getting it up, since there was not a reopen. So it would have required additional litigation and an unsure result on that.

The Peabody operation was moving from north to south, so, in a way, the royalty adjustment on the north lease was, to a certain extent, closing the barn door after the horse was out.

Because they had done a lot of mining on the north lease already. And one thing we did get out of the lease renegotiations was, I think we called it an equalizer. But it was a requirement that they actually do a certain amount of mining on the north lease. I think it was one ton for every two tons on the south lease. We required that that coal on the north lease actually be used up more efficiently.

Q. So the equalizer was to increase or at least seek to ensure that there was no discretion in production on the north lease?

A. Right. We were getting more money out of the north lease because we got the full royalty and tax, whereas, on the south lease, we only got a half. So it was important that that lease be fully mined.

And the water royalty rates went up significantly. And that was something that we wouldn't have gotten out of the—

Q. Uh-huh. Do you recall what they went from to?

A. They were virtually nothing under the old lease, like a dollar and a quarter or something an acre foot, and they went up to $600 an acre foot, if I remember right, for the first 28 acre feet, and then $800 an acre foot for each acre foot thereafter.

So it was a significant increase. And we wouldn't have gotten that. So there were pluses, and there were minuses.

Q. What were the minuses?

A. Well, we were taking less than the twenty percent. We were accepting limitations on our taxing liability. Those were the principal ones.

Q. What if there had been no limitation on the tax, but the royalty rate stayed at twelve and a half percent? Would there have been any problem at all with it, at that time, as the way the Navajo viewed it, anyone in the Navajo Tribe viewed it?

A. Internally, it would have been a lot easier. We would have had a lot less trouble.

Q. Is there not an issue with the Navajo tax, though, if it's—since it's a, it's a business activity or possessory interest tax? It wouldn't necessarily have to be applied equally to all taxpayers, would it?

A. Oh, it would have had to be—

Q. Yeah.

A. —yes. I think—that's not entirely true, but I think, as a general principal, that's true.

Subsequently, I learned you can do other things. You can create special taxing districts and get you around that kind of problem.

Q. I see. Okay.

A. At that point, that was the way we were approaching it, yes. And any tax imposed on Peabody would have to be imposed on all the taxpayers, and there are quite a few taxpayers.

Q. And they would become, at some point—barring some special mechanisms, like taxing, there would become some practical limit how much—even if Peabody could afford to pay some other, there could be some practical limit on how much other taxpayers could afford to pay?

A. Yes.

Q. That the Tribe would have to take into account in dealing with that?

A. Yes. That's correct. I mean, the taxes haven't been raised in the ten years since. And I think that's why.

Q. What, what other trade-offs, negative trade-offs to the Tribe of the deal was agreed to?

A. Well, the back taxes. We gave up a certain amount on the, the Peabody's liability for back tax payments. That's all I can think of right off.

Q. Would, would—is there any advantage to the Tribe, as you, as you viewed it, to have the additional coal provision in the lease? Or was that primarily a benefit to Peabody?

A. Well, I see it as an advantage to the Tribe.

Q. How so?

A. Well, I view the mine as an advantage to the Tribe. It's a revenue source. It's a source of jobs. The more coal, the more revenue, the more jobs. In my view, that's a good thing.

Q. There's some question that's been raised about it, as to whether or not it should have been—the additional coal should have been separately leased whereby—and the new lease put up for bid rather than give it to Peabody in these negotiations. And perhaps a better deal could have been struck, but that at least the Tribe ought to have gotten bonuses from a new lease.

Was there any discussion about that?

A. I believe there was. I thought we got some bonuses for new coal lease. I believe there was.

Q. To come later in time?

A. Yes, when they actually get to the new coal. But there are bonuses in here. As to whether we could have gotten more money out of another company, maybe.

My, my estimate was that would have been difficult. Getting the coal out of there is a real difficult problem. There are unique and expensive transporta-

tion mechanisms in place that would have to be replicated if you had another company up there.

Q. Uh-huh.

A. Or somehow you would have to deal with that.

I mean, there's a railroad that goes to the Navajo Generating Station, and then there's a pipeline that goes to Mohave Generating Station, neither of which would be available to another company without dealing with the companies that own them already.

Q. Uh-huh.

A. And that was the big problem with that lease initially, was getting the coal off Black Mesa. And that problem would have to be dealt with. So maybe you could, maybe you could get more out of some other company. But you've got to cross that bridge and the transportation.

Q. Now, the deal we've just been talking about was, of course, the deal that you, the Tribe, agreed to when you were there, and it was not approved at that time and a new administration came in. Did you ever have a later chance, after you left Navajo, to look at and understand the final deal that was approved by the Secretary of the Interior?

A. I saw, I saw it briefly.

Q. Did you—is there anything about it that differed from the deal you all had struck?

A. I saw it briefly. My recollection is that there were some slight differences in the tax provisions.

Q. But, essentially, the major provisions were the same?

A. I believe they were. I didn't look at them, really, in any depth.

* * * * *

Q. Now, you mentioned that one of the reasons that the Navajo Nation, at least you and the Chairman, then Chairman Zah, was willing to accept the negotiated package was that you didn't have final agency action on the twenty percent royalty appeal.

Would your bargaining position have changed any if Exhibit 2, I believe, the draft decision that was teed up, in John Fritz' words, for his signature, had been issued affirming the twenty percent royalty rate as final for the Department?

A. Yes.

Q. How would it have been affected, your negotiating position?

A. Well, it would have given us additional leverage. Peabody's position had always been that twelve and a half percent was the ceiling as far as any royalty rate they were willing to pay or that we could force them to pay.

If we had final agency action, this would be subject to review only if it was shown to be arbitrary and capricious. And I was personally convinced that it was not that, that it was supported by the record, that it had been made below. I would have felt in a much stronger position as far as the twenty percent on the north lease, and it would have broken that wall, if you will, for the twenty—twelve and a half percent ceiling or broken the ceiling—

Q. Okay.

A. —that Peabody had imposed.

In addition, in any lease—any negotiation, you always make decisions as to whether you're going to continue the negotiation or not. And this would have been something in hand that we did not have that we would have had to consider at every stage of the negotiations.

Q. Would it have been a significant impact, as far as you're concerned, on, on the way you would have negotiated this deal out, to have the twenty percent decision as a final agency action?

A. I would have felt in a much stronger position.

Q. Okay. Now, the other—at least one other factor that you mentioned was the continued litigation delayed any revenues coming in. Were you living on the Navajo Reservation at that time?

A. Yes, I was.

Q. And were you familiar with the conditions on the Navajo Reservation generally?

A. Yes.

Q. And what were those conditions?

A. Not good. We had a population that was very young. The median age was eighteen and a half years. The faci—infrastructure was not in place to provide them any sort of living conditions that were acceptable to a generation that was growing up with TV, that knew there were other things out there, that wanted indoor plumbing, that wanted paved roads, that wanted jobs. The need for money was great, and it was growing daily.

Q. Did that need for revenues provide any pressure for you to stay at the negotiating table and not engage in litigation that at least Interior suggested to us was going to be ongoing for some time?

A. Oh, most definitely.

Q. One question I had, and, and it's a technical question related to the plus—one of the pluses that I thought you testified about, in that the negotiated amendments and that the mining was moving from the north to the south.

Were you aware at the time that the 9910 lease had an equalization provision that required Peabody to mine one ton of north coal for every one ton of 9910 coal?

A. I don't recall that, but it doesn't surprise me.

Q. And in terms of fundability of a royalty dollar and a tax dollar, you would agree, I guess, that a royalty dollar in the door looks exactly the same as a tax dollar in the door?

A. Yes.

Q. But a royalty dollar on paper and a tax dollar on paper could be different, couldn't they, if there were, for example, a tax waiver for all coal going to the Navajo Generating Station due to provisions in the Navajo Generating Station Plant Site lease?

A. Start the question again.

Q. Certainly. Were you aware that there was a, a tax waiver included in the Navajo Generating Station Plant Site lease?

A. Yes.

Q. So that a 20.5 percent royalty, plus tax cap really doesn't equate to 20.5 percent of royalties, plus taxes, nor any coal going to the Navajo Generating Station?

A. That's correct.

Q. So that the revenues that the Navajo Nation receives under a twenty percent royalty rate is quite a bit greater, hypothetically at least, than a 20.5 percent royalty, plus tax cap, when the royalty there is set at twelve and a half percent?

A. That's correct.

Q. Okay.

A. There's no way that you could get to the twenty in the end.

Q. Okay. Now, I wanted to ask you, also, a question about Exhibit 9, which I believe is here in front of me.

MR. ROGERS: Oh, let me give you that.

Q. BY MR. FRYE: We've had testimony from Tim Vollmann in his deposition that this document was less than candid, and we've also had testimony from Colleen Kelley, the author or at least the drafter of this document that, if all the Navajo Nation had known at the time it received this letter was that a decision had not yet been finalized, she would have been outraged.

I wanted to ask you where you found in this letter, if anywhere, the indication that the decision on the appeal was being withheld consciously or unconsciously by the, by the Department of the Interior.

A. Well, the tax doesn't say that.

Q. So you're reading between the lines?

A. Yes.

Q. Okay. And you have a skill that I do not.

A. Well, it's . . .

Q. Okay. When you see the words in the second paragraph of Defense Exhibit 9, "a decision on the appeal is currently being considered by the Deputy Assistant Secretary for Indian Affairs," what—if you can recall, what did that indicate to you at the time that Defense Exhibit 9 was received?

A. Well, what this said to me was that they were not in agreement as far as what the decision should be within the Department.

Q. Okay. So that there was some internal dissent within the Department about the merits of the appeal?

A. Correct.

If—let me, let me clarify something.

Q. Uh-huh.

A. If I said "sitting on the decision," that's really what I meant, was that there wasn't a final decision yet.

Q. Okay.

A. That they were still chewing on it.

Q. Okay. So when you said in your prior testimony "sitting on the decision," you didn't mean the decision had already been reached or at least drafted and people were just not going to issue it?

A. No.

Q. You meant that there were some internal deliberations still going on within the Department?

A. Correct, that is hadn't been resolved internally.

Q. Okay.

A. And it wasn't being brought forward to decision. No one was saying, "Do it already"—

Q. Okay.

A. —you know.

Q. Now, having seen the decision documents that were prepared, I think they're Exhibits 2 and 4, Defense Exhibits 2 and 4, and having seen Exhibit 8, which is the signed version of Peabody's draft that it prepared for Hodel to sign—

MR. ROGERS: It's 2 and 3, actually. I think it's the decision documents.

MR. BELLIS: Yes.

MR. FRYE: Yes. Thank you, sir.

Q. How does that make you feel?

A. Well, I'm not real pleased with it. I don't know how else to express this. My view was that Interior was supposed to be helping us, that they were in our corner, that they weren't some sort of neutral arbitrator acting between two equal parties. And I don't think this is consistent with that role.

Q. Well—and, in fact, it appear to me that, when you look at Exhibit P-1, they've essentially delegated the trust duty to the adversaries of the Navajo Nation. Is that consistent with how you view Peabody's drafting of material for the Secretary, using a intermediary, paid intermediary to get it signed?

A. Well, they certainly accepted their position verbatim.

Q. Do you know how close a relationship Stanley Hulett had with Secretary Hodel?

A. I have no idea.

MR. FRYE: I'd like to talk with counsel for just a second, if I could.

(Brief recess taken at 5:20 p.m.)

MR. FRYE: That's all I have.

MR. ROGERS: Let me just ask one or two questions, and then we'll let you go, sir.

FURTHER EXAMINATION

BY MR. ROGERS:

Q. On the question of having strengthened Navajo bargaining position by getting final agency action on the twenty percent appeal, did you say that you, you felt the Navajos were in a strong position of, of having that affirmed in a judicial review based on a capricious, arbitrary and capricious standard?

A. That's what I felt, yes.

Q. On what did you base that, that view?

A. I was aware of what had been presented to the Area Director. As I now look through these documents more, this comes back to me, that that is where it was presented. I knew what had been presented to him.

Q. You did?

A. Yes. An I think it was a supportable conclusion at the time the Area Director made it. I think it

could have—it was a weighing decision, but once it had been made as final agency action, I felt there was plenty in there to, to support the decision.

Q. What, what do you recall specifically was presented to the Area Director? What can you recall to support this decision?

A. As I remember it, there was a technical study that counsel for Energy Resources Scribes had done on coal royalties that was substantial. I remember referring to that when we were doing these lease renegotiations, and I felt it was good. I felt it was a solid document.

Q. Do you recall a report from Schwab?

A. I really don't remember the names.

Q. Okay. Did, did—in the—at the time or returning to negotiations—well , let me strike that.

At the time of learning that the Secretary or the Department wanted the Tribe to try the negotiating again, when you first became involved actively, was there discussion about administrative, alternative administrative relief or perhaps judicial relief that the Tribe might take to precipitate a decision nonetheless in view of the fact that it would strengthen bargaining position?

A. If I'm remembering this right, we did discuss it, and the feeling was that that's a good way to get a bad decision. If you force the Secretary to decide, he's likely to go, "Oh, well, here. You've got it."

Q. Do you recall what mechanisms you thought might be available to you to precipitate the decision?

A. I don't. I, I recall a discussion as far as taking some sort of court action—

Q. Do you recall who was involved in that? I'm sorry. I didn't mean to interrupt your answer.

A. It would be something like a special action, like they would take against a judge to get him to make a decision. But I remember 12 years ago what we called it then.

Q. Was there a discussion about seeking, within the Department of the Interior, removing the decision to the Interior Board of Indian Appeals, taking it out of the Assistant Secretary's hands?

A. I don't recall that.

Q. Okay.

A. There may have been, but—it's not inconsistent with what was, what was happening—

Q. Okay.

A. —but I, I don't have any independent recollection of that.

United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, DC 20240

December 9, 1987

Memorandum

To: Secretary

From: Assistant Secretary - Indian Affairs

Subject: Request for Secretarial Approval of the Amendments to (Black Mesa Coal Mining Lease) Navajo-Peabody Coal Lease Numbers 14-20-0603-8580 and 14-20-0603-9910, and Hopi-Peabody Coal Lease Number 14-20-0450-5743

Attached for your approval are the subject amendments evaluated by the Navajo and Hopi Tribes with Peabody Coal Company which were submitted by the parties. The Bureau of Indian Affairs and the Office of the Associate Solicitor-Indian Affairs have thoroughly reviewed these amendments pursuant to applicable statutory and regulatory requirements.

I have examined the proposed lease agreements. It is my opinion that the parties have negotiated at arm's length, in good faith to reach these agreements. Through negotiations and the reasonable and acceptable exercise of business judgment for a transaction of this type, I believe the parties have reached fair and equitable agreements.

One issue that has been of particular concern to me is the valuation of the coal for royalty purposes. The agreement provides that the existing rules on coal product valuation shall apply and that in the event the Federal Government enacts new coal product valuation regulations it shall not affect the royalty paid to the tribes by more than 5 percent. Approximately one year ago, the Tribes had reached an agreement with Peabody that did not contain this cap/floor. Upon learning of the proposed produce valuation regulations, the tribes did an analysis of the impact. Renegotiation over this point took almost one year and ended with the proposed cap/floor of 5 percent now included in the lease. I am told that additional consideration was negotiated in the lease also as a result of this. I am convinced that the tribes have adjusted their risk in this matter and are adequately protected from any change in federal product valuation regulation changes.

It is my recommendation that you approve the amendments subject to the following findings, clarifications and condition based on the forgoing and attached information and reviews of the entire transaction. For detailed information, see the attached analysis of the Acting Associate Solicitor, Indian Affairs, the Environmental Assessment, and the Finding of No Significant Impact.

Attachments

No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and regulations thereunder, authorize an Indian Tribe, with the approval of the Secretary of the Interior (Secretary), to lease tribal lands for mining purposes. The question presented is:

Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's approval of an amendment to an existing mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty established pursuant to the IMLA.

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In the Supreme Court of the United States

No. 01-1375

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 263 F.3d 1325. The opinion of the Court of Federal Claims (Pet. App. 31a-79a) is reported at 46 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001.[1] A petition for rehearing was denied

[1] The petition incorrectly states (at 1) that the judgment of the court of appeals was entered on August 24, 2001, rather than August 10, 2001 (see Pet. App. 1a). On September 24, 2001, the government filed a request for an extension of time within which to file a petition for rehearing. The court of appeals granted that request on September 25, 2001, and extended the time for filing a petition for rehearing until October 9, 2001. The government filed a petition for rehearing on October 9, 2001.

on November 16, 2001. On February 4, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 15, 2002. The petition for a writ of certiorari was filed on March 15, 2002, and was granted on June 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, states:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a)(1), and Indian Tucker Act, 28 U.S.C. 1505—are set forth in the petition appendix (at 86a).

STATEMENT

This case concerns the potential liability of the United States in money damages for alleged breach of trust in connection with the government's approval under the Indian Mineral Leasing Act of 1938 (IMLA) of amendments to a mineral lease agreed to by an Indian Tribe and a private lessee.

1. The United States, through the Secretary of the Interior (Secretary), regulates certain aspects of

mineral leasing on Indian tribal lands pursuant to the IMLA, 25 U.S.C. 396a-396g. The IMLA authorizes an Indian Tribe, "with the approval of the Secretary," to lease unallotted tribal lands for mining purposes for a term not to exceed ten years and as long thereafter as minerals are produced in paying quantities. 25 U.S.C. 396a. The IMLA also provides for the Secretary to promulgate rules and regulations governing mineral "operations," 25 U.S.C. 396d, and to authorize other officials in the Bureau of Indian Affairs (BIA) to approve Indian mineral leases, 25 U.S.C. 396e.

The Secretary has promulgated regulations implementing the IMLA. The regulations in effect during the events at issue in this case provided that "Indian tribes * * * may, with the approval of the Secretary * * * or his authorized representative, lease their lands for mining purposes." 25 C.F.R. 211.2 (1985). The regulations established minimum royalty rates for minerals subject to leasing, including, for coal, "not less than 10 cents per ton of 2,000 pounds." 25 C.F.R. 211.15(c) (1985).[2] The regulations provided that an annual rental payment of not less than $1 per acre was required. 25 C.F.R. 211.14(a) (1985). And the regulations provided that lessees could not assign or transfer a lease without the Secretary's approval, 25 C.F.R. 211.26 (1985), and established various other requirements concerning mineral leases.

2. The Navajo Nation, a federally recognized Indian Tribe, occupies the largest Indian reservation in the

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[2] In 1996, the minimum royalty rate on new leases for coal was increased to "12 1/2 percent of the value of production produced and sold from the lease." 25 C.F.R. 211.43(a)(2) (2001). The regulations further state, however, that "[a] lower royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (2001).

United States. The Tribe's reservation comprises more than 25,000 square miles, and spans parts of northeast Arizona, northwest New Mexico, and southeast Utah. Over the past century, large deposits of minerals—including coal, oil, and gas—have been discovered on the Tribe's reservation lands, which are held for the Tribe in trust by the United States. Each year, the Tribe receives tens of millions of dollars in royalty payments pursuant to mineral leases that it has entered into with private companies in accordance with the IMLA. See C.A. App. A2255-A2262.

a. Peabody Coal Company (Peabody) mines coal on the Tribe's lands pursuant to leases covered by the IMLA. Lease 8580 was executed by the Tribe and Peabody (through its predecessor in interest, the Sentry Royalty Company), and was approved by the Secretary in 1964. J.A. 188-244. The lease established a royalty rate of 37.5 cents per ton of coal, but provided that "the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative" on the 20-year anniversary of the lease, and every ten years thereafter. J.A. 194. In 1966, Peabody (through Sentry Royalty Company) entered into two other coal leases, Lease 9910 and Lease 5743. Those leases contained somewhat higher royalty rates than Lease 8580, see C.A. App. A2678, but did not contain a provision subjecting the rates to reasonable adjustment by the Secretary.[3]

[3] Leases 9910 and 5743 cover coal located within a former joint use area shared by the Navajo Nation and the Hopi Tribe. The Navajo Nation and Hopi Tribe split the revenues received from those leases. See C.A. App. A1988, A2678. Leases 9910 and 5743 paid royalties of 6.67 percent for coal sold off the leases and 5.33 percent for coal sold on the leases. *Id.* at A2678.

b. In the 1970s, the Tribe sought to renegotiate its existing mineral leases with its private lessees, including Peabody, to increase the royalty payments generated by those leases. As the 20-year anniversary of Lease 8580 approached, the royalty rate established by that lease of 37.5 cents per ton was "equivalent to about 2% of gross proceeds" on the lease. Pet. App. 2a. That rate was considerably higher than the minimum royalty rate (ten cents per ton) established by the IMLA regulations for coal leases subject to approval by the Secretary, 25 C.F.R. 211.15(c) (1985), but at the same time it was less than the minimum rate (12 1/2 percent of gross proceeds) that was set by Congress in 1977 for coal mined on federal lands under the Mineral Leasing Act. See 30 U.S.C. 207(a); Pet. App. 38a.[4]

In March 1984, the Chairman of the Navajo Tribal Council wrote to the Secretary and asked him to adjust the royalty rate under Lease 8580, in accordance with the term of that lease allowing a "reasonable adjustment" by the Secretary after 20 years. C.A. App. A375-A376. The Chairman claimed that an increase substantially in excess of 12 1/2 percent was warranted in light of the quality of the coal, but that "simple equity" indicated that the royalty rate should not be less than the 12 1/2 percent provided for under federal coal leases. *Id.* at A375. The Chairman also sought the

[4] Twelve and one-half percent is the customary royalty rate for coal leases on federal lands for leases issued or readjusted after 1976. See Minerals Mgmt. Serv., U.S. Dep't of the Interior, *General Federal and American Indian Mineral Lease Terms* <http://www.mrm.mms.gov/Stats/pdfdocs/lse_term.pdf.>. All Indian coal leases that were executed or readjusted during the period from 1985 to 1996 had a royalty rate at or below 12 1/2 percent. *Navajo Nation* v. *Peabody Holding Co.*, No. 99-469, 2002 WL 1457121, at *5 (D.D.C. June 24, 2002).

Secretary's "assistance and support in securing the voluntary adjustment" in the royalty rates under mineral leases that did not contain an adjustment clause like Lease 8580's but that, in the Chairman's view, contained rates that were "unfair and inequitable." *Id.* at A376.

In June 1984, the Area Director of the Bureau of Indian Affairs for the Navajo Area, Donald Dodge, acting pursuant to the Tribe's request, unilaterally adjusted the royalty on Lease 8580 from 37.5 cents per ton to 20 percent of gross proceeds. The 20 percent rate was well in excess of the royalty rate (12 1/2 percent of gross proceeds) governing federal coal leases. The Area Director reached his decision on the royalty adjustment in consultation with the Tribe. See C.A. App. A2685. The Area Director then notified Peabody of his adjustment. Pet. App. 2a-3a; J.A. 8-9.

c. Peabody appealed the Area Director's decision pursuant to 25 C.F.R. 211.2 (1985), challenging, *inter alia*, the Area Director's failure to consult Peabody before reaching his decision (C.A. App. A2288-A2315).[5] The appeal was taken under consideration by Acting Assistant Secretary of the Interior for Indian Affairs, John Fritz. Shortly thereafter, the Tribe broke off

[5] The Department of the Interior's regulations allowed "any interested party adversely affected by a decision * * * of an Area Director of the Bureau of Indian Affairs not approved by the Secretary before the decision was made" to file an administrative appeal. 25 C.F.R. 2.3(a) (1985). The appellant was required to serve the notice of appeal on any other known interested parties, 25 C.F.R. 2.11 (1985), who had the right to file a response, 25 C.F.R. 2.12 (1985). In this case, Peabody (and the utility companies that used coal produced under the lease) appealed the Area Director's royalty adjustment decision to the Commissioner of Indian Affairs. The Tribe filed an answer brief in opposition to those appeals. C.A. App. A477-A483.

negotiations with Peabody on the proposed amendments. Pet. App. 39a-40a.

While its appeal was pending, Peabody wrote to Department of the Interior (DOI) officials, asking them to postpone a decision on its appeal to allow for a negotiated settlement with respect to a full range of issues, including the royalty rate adjustment to Lease 8580. C.A. App. A2686. On July 5, 1985, a Peabody Vice President wrote to Secretary of the Interior Donald Hodel, reporting that following Peabody's appeal of the Area Director's decision, the Tribe continued to negotiate with Peabody toward an agreement providing for a royalty rate of 12 1/2 percent. The Peabody Vice President stated, however, that the Tribe apparently had received word of an imminent decision in the Tribe's favor in the pending appeal, and that the Tribe was suspending negotiations until DOI ruled on the appeal. The Peabody Vice President asked the Secretary to assume jurisdiction of its appeal and either postpone a decision in the appeal to allow a negotiated resolution or rule in Peabody's favor. J.A. 98-100. A copy of that letter was sent to the Tribe. J.A. 100.

In response, the Chairman of the Tribe wrote to the Secretary, stating that negotiations had become stalled over such issues as Peabody's request to mine additional coal and "very difficult" other matters, and expressing the view that, contrary to Peabody's assertion, he was "not confident" that a voluntary agreement could be reached on the royalty rate adjustment and other lease terms. J.A. 119-121. The Chairman urged the Secretary to reject Peabody's request and see to it that the Department issued a decision on the appeal in the Tribe's favor. J.A. 121; Pet. App. 40a.

Peabody retained Stanley Hulett, a former aide and friend of Secretary Hodel, and sought a meeting with the Secretary. The record indicates that Hulett and Peabody representatives met with Secretary Hodel in July 1985. J.A. 102. On July 17, 1985, Secretary Hodel sent a memorandum to Acting Assistant Secretary Fritz (J.A. 117-118), which had been provided to the Secretary by Peabody, "suggest[ing]" that he inform the parties "that a decision on th[e] appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." J.A. 117. The Secretary's memorandum explained that "[a]ny royalty adjustment which is imposed on those parties without their concurrence will almost certainly be the subject of protracted and costly appeals," and "could well impair the future of the contractual relationship" between the parties. *Ibid.* The Secretary assured the Acting Assistant Secretary, however, "that this memorandum is not intended as a determination of the merits of the arguments of the parties with respect to the issues which are subject to the appeal." J.A. 118.[6]

d. The Tribe "has denied contemporaneous knowledge of the Hodel-Hulett meeting or its results," and at most "admit[s] that 'someone from Washington' had

[6] The court of appeals appears to have believed that Acting Assistant Secretary Fritz had decided Peabody's appeal in favor of the Tribe, but then withdrew that decision in response to the Secretary's July 1985 memorandum. Pet. App. 3a. Although a draft decision in favor of the Tribe had been prepared, the record does not establish that a final decision (which would have required the signature of the Commissioner of Indian Affairs, 25 C.F.R. 2.3, 2.19 (1985)) had been issued. See Pet. App. 40a; C.A. App. A2686-A2687. In any event, even if the Acting Assistant Secretary had issued his decision, the Department's regulations authorized the Secretary "to direct any [Department employee] to reconsider a decision." 43 C.F.R. 4.5(a)(2) (1985).

urged a return to the bargaining table." Pet. App. 43a; see C.A. App. A2370, A2589, A2690-A2691. In any event, in late August 1985, the Tribe and Peabody renewed their negotiations. On September 23, 1985, they reached a tentative agreement over a package of amendments not only to Lease 8580 but also to Leases 9910 and 5743. Pet. App. 42a. The negotiated agreement resolved a broad range of issues concerning the existing leases between the parties. J.A. 277-311.

In particular, "[i]n consideration of the benefits associated with these lease amendments," the parties agreed to move jointly to vacate the Area Director's July 1985 decision imposing a royalty rate adjustment under Lease 8580 to 20 percent. J.A. 286-287. Instead, the parties agreed to adjust the royalty rate under Lease 8580 from 37.5 cents per ton to 12 1/2 percent of the monthly gross proceeds. J.A. 287. Peabody further agreed to pay royalties at the new 12 1/2 percent rate on all coal mined under the lease since February 1, 1984, more than a year and a half earlier. *Ibid.* Peabody also agreed to increase the royalty rates with respect to Leases 9910 and 5743, even though those leases, unlike Lease 8580, did not contain any provision for the adjustment of the royalty rate during the lease. C.A. App. A2678, A2692.

At the same time, Lease 8580 was amended to acknowledge the validity of tribal taxation of coal production, and recognize the Tribe's agreement to waive certain back tribal taxes. J.A. 295-296, 298-299. The tax rate was to be capped at eight percent, which "would thus permit the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." Pet. App. 44a.[7] Peabody further agreed to pay the Tribe

[7] This Court had just upheld the right of the Navajo Nation to impose taxes on lessees under tribal leases. See *Kerr-McGee Corp.*

$1.5 million when the amendments became effective, and $7.5 million when it began mining additional coal agreed to by the parties as part of the lease amendments. J.A. 292-293. The agreement "also addressed ancillary matters such as provisions for future royalty adjustments, arbitration procedures, rights of way, the establishment of a tribal scholarship fund, and the payment by Peabody of back royalties, bonuses, and water payments." Pet. App. 43a.

e. In August 1987, the Navajo Tribal Council approved the lease amendments, finding that they were in "the best interest of the [Tribe]." C.A. App. A2432-A2433. A final agreement was signed by the parties in November 1987. The parties then asked Secretary Hodel to approve their agreement. The Secretary formally approved the lease amendments on December 14, 1987. J.A. 337-339. Shortly thereafter, and in accordance with the agreement between the Tribe and Peabody, the Area Director's June 1984 decision adopting a 20 percent royalty rate was vacated. Pet. App. 45a.

3. In 1993, the Tribe brought suit against the United States in the Court of Federal Claims, alleging, *inter alia*, that the Secretary's approval of the lease amendments agreed to by the Tribe and Peabody adjusting the royalty rate on Lease 8580 to 12 1/2 percent of gross proceeds constituted a breach of trust. The Tribe did not seek to invalidate the lease amendments approved by the Secretary, but instead sought $600 million in damages while keeping the amendments to all three leases in effect. On cross-motions for summary judg-

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v. *Navajo Tribe*, 471 U.S. 195 (1985); Pet. App. 39a-40a. The Area Director's decision imposing a 20 percent royalty rate was rendered prior to *Kerr-McGee*.

ment, the Court of Federal Claims granted judgment for the United States. Pet. App. 31a-79a.

The Court of Federal Claims found that the United States had entered into a general fiduciary relationship with the Navajo Nation by virtue of its relationship with Indian Tribes and the fact that the United States holds tribal lands in trust. Pet. App. 48a. The court noted that the relationship between Indians and the United States "is not necessarily described by the common law of trusts," but the court nevertheless first considered the government's actions against the duties that would be recognized by a court of equity as governing the actions of a common law trustee. *Ibid.* Applying the common law, the court concluded that the Secretary had contravened fiduciary duties of care, loyalty, and candor by meeting with Peabody while its administrative appeal was pending and not disclosing that meeting to the Tribe. *Id.* at 48a, 52a. The court further observed that, "[w]ere this a court of equitable jurisdiction considering a private trust, [the Tribe] might easily qualify for remedies typically afforded wronged beneficiaries." *Id.* at 52a. But those circumstances, the court explained, "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Ibid.*

Rather, the court continued, "to succeed in litigation in this Court, [the Tribe] must show that IMLA imposes specific fiduciary duties on the government, as opposed to general duties, and that the United States violated a specific fiduciary duty which Congress intended to compensate with money damages." Pet. App. 53a. In determining whether the Tribe had made that showing, the court reviewed the IMLA and the Secretary's implementing regulations in the light of this Court's decisions in *United States* v. *Mitchell*, 445

U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). See Pet. App. 54a, 59a-61a.

The court observed "that in enacting IMLA, the United States assumed the responsibility to manage minerals such as coal in a fiduciary capacity." Pet. App. 55a. But after reviewing the IMLA and the Secretary's implementing regulations, the court concluded that the United States's "responsibility as it relates to coal royalties does not rise above a generalized trust obligation," which, the court explained, is not sufficient under the *Mitchell* decisions to create a duty that, if breached, would require the government to pay damages. *Id.* at 66a; see *id.* at 67a ("[N]either IMLA nor its implementing regulations, 25 C.F.R. Part 211, impose specific duties regarding the Secretary's adjustment of royalty rates for coal."). The court further concluded that, although the Tribe's complaint "[a]lleg[ed] breaches of general fiduciary duties, [it] * * * failed to link any breach to a specific money-mandating statutory or regulatory provision." *Id.* at 66a.

The court emphasized that the Tribe "cites no provision *with respect to royalty-setting* that demonstrates federal *control* over that process." Pet. App. 67a. Indeed, the court noted that in this case "the Secretary's role with respect to royalty adjustment, in particular, *derives solely from the terms of the lease*" between the Tribe and Peabody—*i.e.*, the provision of Lease 8580 allowing the Secretary to make a "reasonable adjustment" in the royalty rate after 20 years, *ibid.*—rather than from a statute or regulation. "Even then," the court continued, "the Secretary's only guidance was to be 'reasonable' in revising rates." *Id.* at 67a-68a. The court acknowledged that, "as a matter of

policy, DOI would not approve coal leases with royalties less than those the [United States] would receive for its own coal," *i.e.*, 12 1/2 percent. *Id.* at 68a. But, the court noted, "[n]owhere does that policy, nor any other policy, impose an affirmative duty to interject government-dictated royalty rates," and the Tribe did not in any event assert "that the 1987 approval of Lease 8580, with royalties of 12.5 percent, ran afoul of that policy." *Ibid.*[8]

4. a. The Court of Appeals for the Federal Circuit reversed. Pet. App. 1a-30a. The court began by discussing this Court's *Mitchell* decisions, see *id.* at 5a-6a, and its own precedents involving breach of trust claims by Indians, including its recent decision in *White Mountain Apache Tribe* v. *United States*, 249 F.3d 1364 (2001), cert. granted, No. 01-1067 (Apr. 22, 2002). In *White Mountain Apache*, the court noted, "[a]lthough the statute [at issue] was silent on how the United States was to administer the property," the court looked to the common law of trusts and found in the common law a duty on the part of the United States enforceable in a suit for damages, "despite the absence of a specific statute and regulations." Pet. App. 6a.

The court of appeals then analogized this case to *Mitchell II*, where this Court held that the Tribe was entitled to damages for the alleged breach of trust with respect to Indian timber management. The court of appeals believed that the degree of federal involvement in this case with respect to mineral leasing on Indian

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[8] The Court of Federal Claims also rejected the Tribe's independent claim for breach of contract with respect to the Lease 8580, finding that the Secretary was not a party to that lease, and that the Secretary's authority under the lease to adjust the royalty rate was not a binding contractual obligation on him to do so. Pet. App. 69a-75a.

lands was comparable to the degree of federal involvement in Indian timber management under the governing statutes and regulations in *Mitchell II*. Pet. App. 8a; see *id.* at 8a-10a. Pointing to 25 U.S.C. 399 (which, as explained below, is not part of the IMLA), the court also concluded that "the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes." Pet. App. 9a, 11a. With that understanding, the court concluded that the Court of Federal Claims had erred in finding that there was not a sufficient trust relationship between the United States and the Tribe with respect to coal resources that could give rise to a claim for money damages for breach of trust here. *Id.* at 11a.

After finding the existence of such a trust relationship, the court of appeals held that the Secretary's actions with respect to Peabody's administrative appeal concerning the adjustment of the royalty rate under Lease 8580—which the court characterized as "suppressing and concealing" the decision of the Acting Assistant Secretary and "thereby favoring Peabody's interests to the detriment of Navajo interests," Pet. App. 11a—violated both the common law duties on which the Court of Federal Claims had relied, as well as what the court of appeals described as a statutory duty "to obtain for the Indians the maximum return for their minerals." *Id.* at 12a. The court did not, however, identify what specific provision of the IMLA or the Secretary's implementing regulations had imposed such a duty upon or had been violated by the Secretary. Nonetheless, citing *Mitchell II*, the court concluded that the Tribe was entitled to damages for breach of the fiduciary duties the court had described. *Id.* at 12a-13a; see *id.* at 12a ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment

of 'damages resulting from a breach of the trust.'"). The court remanded for further proceedings, including a determination of damages. *Id.* at 13a.

b. Judge Schall concurred in part and dissented in part. Pet. App. 13a-30a. Drawing on this Court's *Mitchell* decisions, he reasoned that it is not enough for a Tribe to show a violation of a general fiduciary relationship stemming from federal involvement in a particular area of Indian affairs. Rather, "to state a claim upon which relief can be granted," Judge Schall reasoned, a Tribe "must show the breach of a specific fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship at issue." *Id.* at 29a-30a; see *id.* at 16a ("[U]nder *Mitchell II*, the focus is on the statute and regulations that create the fiduciary relationship.").

Judge Schall agreed that the IMLA and implementing regulations create a "general fiduciary relationship" between the United States and the Tribe, but at "this point [he] part[ed] company with the majority." Pet. App. 25a. In his view, "the only government action in this case that implicated a specific fiduciary responsibility to the [Tribe] was DOI's approval of the Agreement" in 1987. *Id.* at 26a. He explained that, even if the government's actions "may demonstrate disloyalty to the [Tribe] in a vacuum," the Tribe was required to show that the government breached a specific fiduciary obligation with respect to the agreed package of lease amendments. *Id.* at 28a. Judge Schall concluded that the Secretary had breached such a duty by failing to conduct an economic analysis of the lease agreement, which, he found, citing common law principles, was implicit in the Secretary's authority to approve the lease amendments. *Ibid.*; see *id.* at 26a-27a.

SUMMARY OF ARGUMENT

The Tribe is not entitled to money damages for the alleged breach of trust in this case, because it has failed to show the violation of any statute or implementing regulation that would mandate compensation by the government if breached.

A. The United States is immune from suit for damages, except as clearly authorized by Congress. In the Tucker Act and the Indian Tucker Act, Congress has waived sovereign immunity from damages actions against the United States with respect to claims based on an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491(a)(1). This Court has further emphasized that, to recover damages under one of the Tucker Acts, a plaintiff must show the violation of a statute or implementing regulation that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. In recent cases, this Court has emphasized that it is unwilling to venture beyond the terms of the governing Act of Congress when it comes to determining whether Congress has in fact authorized a private cause of action or private remedy in such an action. *E.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268 (2002). Such restraint is all the more necessary when, as here, the question is whether Congress has authorized a damages remedy against the sovereign itself.

B. The court of appeals erred in holding that the United States may be liable in damages for the alleged breach of trust in this case, because the court failed to identify the violation of any specific statutory or regulatory duty, much less find that the government violated a statute or regulation that would clearly mandate the payment of damages. Instead, the court of

appeals simply reasoned at an abstract level that, under *Mitchell II*, damages were available against the United States because, in the court's view, the government had breached a general trust relationship with the Tribe in connection with the lease amendments at issue. Pet. App. 12a. That reasoning finds no support in *Mitchell II*. There, each of the Indians' breach-of-trust claims was carefully grounded on the violation of specific statutory or regulatory duties. In addition, the court of appeals' reasoning contradicts the terms of the Tucker Act, which grant jurisdiction and waive the sovereign immunity of the United States with respect to claims based on the violation of an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), and not claims based on breaches of generalized trust principles identified by a court.

In finding that the United States had breached a trust duty triggering a damages remedy, the court of appeals focused on what it called "[t]he action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary" with respect to Peabody's administrative appeal of the Area Director's decision unilaterally to increase the royalty rate on Lease 8580 to 20 percent of the gross proceeds. Pet. App. 11a. But nothing in the IMLA or in the Secretary's regulations implementing the IMLA imposes any specific duties on the handling of such appeals. Nor was the court of appeals free to override or supplement the general procedural rules governing such appeals. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Moreover, procedural rules are not by their nature fairly capable of being interpreted as mandating the payment of damages against the government if violated.

Although the court of appeals did not point to the violation of any specific statute or regulation, the Tribe has argued that the Secretary's actions violated a requirement in the IMLA and its implementing regulations to act in the "best interests" of the Indians. The statutory language on which the Tribe has relied, however, comes from a provision (25 U.S.C. 396b) that governs the *rejection* of *oil and gas* leases, and not the *approval* of *coal* leases, which is governed by a different provision (25 U.S.C. 396a) that contains no "best interests" language. The Tribe also points to a regulation (25 C.F.R. 211.43(b) (2001)), but that provision was not adopted until a decade *after* the events at issue. In addition, that regulation requires the Secretary to consider the "best interest of the Indian mineral owner" only when the owner has agreed to a royalty rate that is *less* than the minimum rate for leases of federal coal. *Ibid.* The regulation in no way obligates the Secretary to make such a finding before approving a lease—such as the amendments in this case—with a rate equal to or *more* than the minimum federal rate for coal.

The Tribe also argues that the Secretary was required to conduct an independent economic analysis before approving the lease amendments in this case. But no provision of the IMLA or regulation implementing that Act obligates the Secretary to conduct such an analysis. In the absence of such a specific statutory or regulatory duty, the Tucker Act does not subject the United States to money damages for any claim that the Secretary inappropriately failed to conduct such an analysis. Furthermore, judicial implication of such an independent economic analysis requirement would conflict with the IMLA's focus on permitting Indian mineral lease owners to negotiate their own rates, subject to the backstop protection of

the minimum rate, which the lease amendments in this case generously *exceeded*.

C. Relying on *Mitchell II*, the court of appeals reasoned that the federal involvement with respect to Indian mineral leasing was itself sufficient to subject the United States to damages for any alleged breach of trust in connection with Indian mineral leases. That analytical approach was mistaken. To begin with, the level of federal involvement in Indian mineral leasing is fundamentally different, and less encompassing, than the federal involvement in Indian timber management. Indeed, in *Mitchell II*, this Court emphasized that the United States had assumed "pervasive" control over Indian timber management, and had regulated "virtually every aspect of [Indian] forest management." 463 U.S. at 220. By contrast, the key provision of the IMLA transferred Indian mineral leasing authority from the Secretary *to the Tribes*, 25 U.S.C. 396a, and one of the central objectives of that Act is to foster Indian self-determination. Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989).

Moreover, to the extent that the Court discussed the federal control over Indian timber management in *Mitchell II*, it explicitly focused on the "fiduciary management duties" that the government had assumed over Indian timber. 463 U.S. at 218. As the Court explained, the statutes and regulations at issue in *Mitchell II* expressly provided that, *inter alia*, sales of Indian timber made by the government on behalf of Indians shall be based upon a consideration of "the needs and best interests of the Indian owner and his heirs," as well as the "present and future financial needs of the owner and his heirs." *Id.* at 222 (quoting statutes). Congress has not imposed, and the Secretary has not assumed, any comparable fiduciary manage-

ment duties with respect to Indian mineral leasing. To the contrary, the focus in the IMLA is on permitting Indian mineral lease owners to negotiate their *own* royalty rates. Furthermore, the Court in *Mitchell II* did not focus simply on the existence of federal control; it looked to whether the statutes and regulations on which the plaintiffs relied could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they [*i.e.*, the statutes and regulations] impose[d]." *Id.* at 219.

D. The court of appeals also erred in treating the United States as if it were a simple private trustee, liable in money damages to an Indian Tribe for breach of duties that might be recognized at common law. Neither the Tucker Act nor, even more tellingly, the Indian Tucker Act, confers jurisdiction with respect to claims based on the violation of the common law. Instead, as pertinent here, those Acts confer jurisdiction only over claims based on the violation of an Act of Congress or implementing regulation. Holding that the United States may be liable in damages for breach of duties drawn by a court from the common law not only would greatly expand the potential liability of the United States for breach of trust, but also would conflict with well-established principles of sovereign immunity and the terms of the Tucker Acts, which require claimants to point to the violation of a source of positive law that clearly mandates the payment of damages if violated. Because the court of appeals did not identify the violation of any such source of law, and none is available with respect to the alleged breach of trust in this case, the Tribe's damages claims should be dismissed.

ARGUMENT

THE UNITED STATES HAS NOT VIOLATED ANY "ACT OF CONGRESS" OR "REGULATION OF AN EXECUTIVE DEPARTMENT" THAT WOULD SUBJECT IT TO MONEY DAMAGES FOR THE ALLEGED BREACH OF TRUST

A. The United States Is Immune From Suit Except As Clearly Authorized By Congress

This case, like *United States* v. *White Mountain Apache Tribe*, No. 01-1067, turns on basic principles governing the sovereign immunity of the United States from suit, and the limited statutory jurisdiction of the Court of Federal Claims to entertain claims for damages against the United States.

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Eastern Transp.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1868). In determining whether such consent is present, this Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).

2. Congress has consented for the United States to be sued on certain claims for money damages in the

Court of Federal Claims. The Tucker Act grants that court jurisdiction with respect to

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1).

The Indian Tucker Act grants jurisdiction to the same court with respect to claims by an Indian Tribe against the United States, "whenever such [a] claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. 1505. As this Court has explained, the Indian Tucker Act was enacted in 1946 to ensure that Indian or tribal claimants would enjoy the "same" rights and remedies in suits against the United States as non-Indians, but no more. *Mitchell I*, 445 U.S. at 539; see *Mitchell II*, 463 U.S. at 212 n.8; H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945) (Indian "claimants are to be entitled to recover in the same manner, *to the same extent, and subject to the same conditions and limitations*, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought [under The Tucker Act] by non- Indians.") (emphasis added).

The Tucker Acts themselves do "not create any substantive right enforceable against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 738 (1982); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Thus, in order to state a cause of action

under one of the Tucker Acts, a plaintiff suing other than for breach of contract must point to an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400, and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 905-906 n.42 (1988); *Sheehan*, 456 U.S. at 739.[9] The requisite waiver of sovereign immunity is present under the Tucker Acts only if "a claim falls within th[at] category." *Mitchell II*, 463 U.S. at 218; see *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990).

This Court has observed that "the substantive source of law may grant the claimant a right to recover damages either 'expressly or by implication.'" *Mitchell II*, 463 U.S. at 217 n.16; but cf. *Sheehan*, 456 U.S. at 739-740 ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly."). But the Court is reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with these established principles [concerning the reach of the Tucker Act] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy."); see also *Mitchell II*, 463 U.S. at 218 ("Of course, in determining the general scope of the Tucker Act, this Court has not lightly

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[9] The Indian Tucker Act also permits claims by an Indian Tribe based on a Treaty of the United States or an Executive Order of the President. 28 U.S.C. 1505. No such claim is at issue here.

inferred the United States' consent to suit.") (citing cases). That restraint reflects the general rule that waivers of sovereign immunity must be unequivocally expressed. See *Mitchell I*, 445 U.S. at 538; *OPM* v. *Richmond*, 496 U.S. 414, 432 ('990).

The requirement of such restraint is reinforced by the Court's repeated refusal in more recent decisions to recognize implied private causes of action or remedies outside of the Tucker Act context, even in suits against parties other than the United States. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2275 (2002) (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001) (declining to extend implied cause of action established by *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to new context); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) (no implied right of action to enforce disparate-impact regulations under Title VI); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to recognize implied right of action under *Bivens* against federal government).

3. This Court's *Mitchell* decisions involved actions that were brought by Indian claimants under the Tucker Acts and were governed by the general principles outlined above. In the *Mitchell* litigation, the Quinault Tribe and individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—under which the United States holds allotted lands "in trust for the sole use and benefit of the Indian [allottees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not authorize a damages

action against the United States for alleged mismanagement of timber resources on allotted lands. The Court explained that the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]," and that it did "not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of allotted lands." *Id.* at 542 (emphasis added).[10] Thus, the Court held, the General Allotment Act did not support "[a]ny right of the [Indians] to recover money damages for Government mismanagement of timber resources." *Id.* at 546.

In *Mitchell II*, the Court considered a different set of statutes and regulations and held that those provisions, unlike the General Allotment Act, could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose[d]." 463 U.S. at 219. In so holding, however, the Court emphasized that the provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber," *id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"), and that "the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Id.* at 226.[11]

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[10] The Court explained that Congress provided for allotted lands to be held "in trust" simply because it wanted to prevent alienation of the land and to ensure that allottees would be immune from state taxation. *Mitchell I*, 445 U.S. at 544.

[11] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the statutes and regulations in that case failed to confer "the necessary legislative authorization of a damages remedy"

As explained below, a proper understanding of the *Mitchell* decisions—and application of the basic principles governing suits against the United States and limitations on implied rights to recover money damages—compels the conclusion in this case that the Tribe has failed to state a claim for damages.

B. The Tribe Has Not Shown The Violation Of Any Statute Or Regulation That Would Mandate The Payment Of Damages By The Government If Breached

The court of appeals' decision in this case founders on one central and inescapable conclusion: it holds that the United States may be liable in damages for alleged breach of trust without finding the violation of any particular statute or regulation that, even if breached, would mandate the payment of damages. In his separate opinion, Judge Schall recognized that shortcoming. See Pet. App. 26a (The "majority errs" by "fail[ing] to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations [at issue]."); see also *id.* at 28a, 29a-30a. The Court of Federal Claims similarly recognized that fatal jurisdictional defect in the Tribe's claim. *Id.* at 66a ("Alleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific

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against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400). They emphasized that "courts are not free to dispense with 'established principles' requiring explicit congressional authorization for maintenance of suits against the United States simply 'because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.'" *Id.* at 232 (quoting *Testan*, 424 U.S. at 400).

money-mandating statutory or regulatory provision."); see *id.* at 53a, 57a, 68a.

1. The Tucker Act, in clear and unmistakable terms, confers jurisdiction with respect to claims that are founded upon an "Act of Congress" or a "regulation of an executive department." 28 U.S.C. 1491. That requirement is just as applicable in a case brought by an Indian Tribe alleging breach of trust as it is, for example, in a case brought by a federal employee seeking back pay for allegedly improper job classification in federal employment. Cf. *United States* v. *Testan*, *supra*. Indeed, as discussed above, the Indian Tucker Act was enacted to ensure that Indian claimants would be able to recover damages against the United States "in the same manner," but also "subject to the same conditions and limitations," as non-Indian claimants. H.R. Rep. No. 1466, *supra*, at 13; see p. 22, *supra*.

Mitchell II illustrates the point. Although the Indian plaintiffs in that case "alleged breaches of trust in connection with [the government's] management of forest resources on allotted [Indian] lands," 463 U.S. at 207, their claims tracked specific duties set forth in the statutes or regulations governing federal Indian timber management. See *id.* at 210 (describing claims); *id.* at 211, 219-224 (discussing statutes and regulations on which the damages claims were predicated); see also, *e.g.*, 25 U.S.C. 406(a) (proceeds from timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c) (1985) (timber "shall be appraised" and sold at not less than

appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

More to the point, in analyzing "whether the United States [was] accountable in money damages for alleged breaches of trust in connection with its management of [Indian] forest resources," *Mitchell II*, 463 U.S. at 207, the Court first examined the "various Acts of Congress and executive department regulations" on which the Indian plaintiffs "based their money claims against the United States." *Id.* at 219; see *id.* at 219-223. Then, after examining those sources of "substantive law," it looked to "whether *they* [*i.e.*, the statutes or regulations on which the plaintiffs relied] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." *Id.* at 219 (emphasis added). *Mitchell II* thus teaches that, even when the United States might be said to have assumed a general trust relationship with an Indian Tribe or with respect to certain Indian resources, a damages claim for breach of trust must be grounded on the violation of a specific statute or regulation that gives content to that relationship. See *id.* at 224 (The statutes and regulations governing Indian timber management "establish a fiduciary relationship *and define the contours of the United States' fiduciary responsibilities.*") (emphasis added).

The court of appeals in this case, however, analyzed the breach of trust issue almost entirely at a higher level of abstraction, focusing on whether "a trust relationship indeed existed and exists with the Nation." Pet. App. 2a; see *id.* at 11a ("The Court of Federal Claims erred in holding that there was no authorization for a trust relationship between the United States and the Navajo Nation as to coal resources."). Even if the

IMLA and the Secretary's implementing regulations established a generalized trust relationship similar to that which this Court found in *Mitchell II* with respect to Indian timber resources, the court of appeals did not find—and the Tribe has not shown—the violation of any specific duty imposed by the statutes or regulations giving content to that relationship, much less the violation of a specific statutory or regulatory duty that could fairly be interpreted as mandating compensation by the government if breached. See Pet. App. 26a (Schall, J., concurring in part and dissenting in part); *id.* at 66a (Court of Federal Claims). Instead, the court of appeals simply stated that "monetary damages are an available remedy [against the United States] for breach of th[e] trust." *Id.* at 2a; see *id.* at 12a ("Breach by the federal government of its fiduciary duty is subject to remedy by the assessment of 'damages resulting from a breach of the trust.'").

That mode of analysis cannot be squared with this Court's focus in *Mitchell II* on the specific statutes and regulations on which the damages claims in that case were based. Nor can it be squared with explicit jurisdictional requirements of the Tucker Act. The court of appeals' failure to identify the violation of any specific "Act of Congress" or "any regulation of an executive department" (28 U.S.C. 1491(a)(1)) that would mandate the payment of damages by the government if breached was clear error. And that error alone compels reversal of the judgment below.

2. The alleged breach of trust on which the court of appeals did focus in its decision underscores how far the court strayed from the terms of any specific statutes or regulations that conceivably could be implicated in this case. In finding that the United States had breached a duty to the Tribe that would entitle the

Tribe to damages, the court of appeals did not object to the Secretary's approval of the lease amendments in 1987, or to the fairness of the lease package that the Tribe negotiated with Peabody and asked the Secretary to approve in 1987. Instead, the court pointed to what it characterized as the "[t]he action of the Secretary in suppressing and concealing the decision of the Deputy Assistant Secretary" on Peabody's administrative appeal concerning the adjustment of the royalty rate pursuant to a provision in Lease 8580 that was *superseded* by those amendments. Pet. App. 11a; see *id.* at 11a-12a. But even accepting the court of appeals' characterization of events, the Secretary's actions did not violate any statutory or regulatory duty, much less one that would mandate the payment of damages for a violation.

a. Nothing in the IMLA or its implementing regulations imposes any specific duties on the Secretary with respect to the handling of administrative appeals. Rather, it is Interior Department regulations of general applicability that establish a process for appeals from administrative actions by various Department officials, see 25 C.F.R. Pt. 2 (1985 & 2001), and the procedural standards governing that process are defined by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the Interior Department regulations, not by the IMLA. The court of appeals did not find that the Secretary's actions violated any provision of the Department's procedural rules or the APA. And, in fact, the Department rules in effect at the time the Secretary acted provided that nothing in the regulations governing hearings and appeals "shall be construed to deprive the Secretary of any power conferred upon him by law," including, but not limited to, the authority to take jurisdiction of any case

pending before any employee and to render a final decision on it, and the authority to review any decision of any employee or to direct any such employee to reconsider a decision. 43 C.F.R. 4.5(a)(1) and (2) (1985).

Nor was the court of appeals free to override or supplement the procedural rules adopted by the Secretary with its own view of the proper relationship between the Secretary and a subordinate official concerning an internal agency appeal. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Indeed, the court of appeals seriously misapprehended the constitutional structure of our government in characterizing the decision by the Head of an Executive Department not to allow a draft of a decision of a subordinate officer to go into effect as the improper "suppressing and concealing" (Pet. App. 11a) of the action of one of his subordinates. And it seriously misapprehended *Mitchell II* and the general Tucker Act principles discussed above in finding that such action, even if it had violated some procedural rule, entitled the Tribe to money damages.

b. Even if the Secretary had violated some procedural rule in handling Peabody's administrative appeal, that would not entitle the Tribe to damages under the Tucker Act. As discussed above, only a statute or regulation that "can fairly be interpreted as mandating compensation" may support a claim for damages under the Tucker Act. *Mitchell II*, 463 U.S. at 216-217; p. 23, *supra*. None of the procedural regulations referred to by the court of appeals, or relied upon by the Tribe, creates a right to be paid a sum certain, speaks in terms of money damages or claims, or has any other monetary character at all. See *Testan*, 424 U.S. at 400; *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting) ("Although not disposi-

tive, the monetary character of a statutory right is a strong indication that a statute 'in itself . . . can fairly be interpreted as mandating compensation.'"); cf. *Gonzaga Univ.*, 122 S. Ct. at 2274 (right of action has been recognized under 42 U.S.C. 1983 when a statute "conferred specific monetary entitlements" or required payment of "'objective' monetary entitlement").

Procedural duties are in the nature of due process protections, and even constitutional procedural due process violations do not give rise to a damages claim under the Tucker Act. See, *e.g.*, *Testan*, 424 U.S. at 403; *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976). Accordingly, instead of a suit for money damages, any recourse that the Tribe might have had for an alleged violation of a procedural rule in the course of the Secretary's approval of the lease amendments would have been available, if at all, only in an action under the APA to set aside the Secretary's 1987 decision approving the lease amendments, or to challenge the suspension of (or seek the reinstatement of) the administrative appeal proceedings concerning the Area Director's decision to increase the royalty rate under the adjustment clause of Lease 8580. The Tribe has never brought such an action, however; instead, it has brought this action seeking damages for breach of trust while seeking to retain all the benefits of the entire package of lease amendments negotiated by the parties and approved by the Secretary in 1987.

The court of appeals' reliance on the Secretary's actions with respect to Peabody's administrative appeal was misplaced for another reason as well. As the Court of Federal Claims noted, the Secretary's authority to adjust the royalty rate at issue in this case was "*derive[d] solely from the terms of the lease*" that the Tribe had executed in 1964, not from the IMLA. Pet.

App. 67a. A breach predicated on the Secretary's actions provided for under the Lease would not be based on a violation of an Act of Congress or regulation, as the Tucker Acts require. Moreover, the lease simply authorized, but did not require, the Secretary to make a "reasonable adjustment" in the royalty rate, and what would be a reasonable adjustment under a lease entered into by both the Tribe and Peabody could properly take into account the interests of both parties, not those of the Tribe alone. Accordingly, even if (contrary to our submission, see pp. 37-39, *infra*) the IMLA or implementing regulations required the Secretary to disapprove a lease or lease amendment if she concluded that it would not maximize revenue to the Tribe concerned, the lease provision that authorized the Secretary's actions here imposed no such duty.

Finally, to the extent that the court of appeals believed that the Secretary's actions in 1985 in connection with the administrative appeal of the royalty rate adjustment under the provisions of the then-existing lease rendered his subsequent approval of the lease *amendments* a breach of fiduciary duty, it was mistaken. To establish a breach of fiduciary duty in approving the lease amendments, the Tribe at a minimum would be required to establish that the Secretary could not reasonably have believed that the overall outcome of the negotiated package—the lease amendments themselves—was in the Indian mineral owner's best interest. The Tribe has made no such claim. Cf. *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 312-313 (1989); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry * * * is at an end. The fact that the method employed

to reach that result may contain infirmities is not then important.").

The only provision of law governing mineral leases that arguably could be interpreted as requiring compensation for its breach is the regulation that set the minimum royalty rates for minerals subject to leasing, including coal. 25 C.F.R. 211.15(c) (1985). But the Tribe understandably has not alleged a violation of that provision. The lease amendments negotiated by the Tribe and approved by the Secretary in 1987 contained a royalty rate (12 1/2 percent of gross proceeds) well *in excess of* the minimum rate at that time for coal leases under IMLA—10 cents per ton, or less than *one* percent of gross proceeds. *Ibid.* Even the original royalty rate on Lease 8580 (37.5 cents per ton) was considerably higher than that standard. Following their amendment in 1987, the royalty rate under the three leases (*i.e.*, Leases 8580, 9910, and 5743, see p. 9, *supra*)—each of which provides for a total royalty rate of 12 1/2 percent—was well above the minimum rate. Indeed, all three leases would have satisfied the new standard that was subsequently adopted by the Secretary in 1996, nine years after the lease amendments in this case were approved. 25 C.F.R. 211.43(a)(2) (2001) (minimum royalty rate for open-pit or strip coal leases is 12 1/2 percent of the value of coal sold from lease).

c. The court of appeals did not specifically focus on the meeting in July 1985 between Secretary Hodel and representatives of Peabody, while Peabody's administrative appeal was pending, see Pet. App. 11a-12a, and the Tribe did not rely on that meeting as the act that allegedly gave rise to a right to recover money damages, see *id.* at 32a. But even assuming that the Tribe had no knowledge of that meeting, it would not have violated any statute or regulation mandating compensation if breached and, indeed, it would not have violated any substantive law at all.

The Interior Department's regulations governing appeals from a decision of an Area Director, such as Donald Dodge, allowed for an appeal to the Commissioner of Indian Affairs (Commissioner), and then to the Interior Board of Indian Appeals (IBIA or Board). 25 C.F.R. 2.3(a) (1985). In addition, the regulations allowed a party to transfer an appeal from the Commissioner to the Board if the appeal had been fully briefed and pending before the Commissioner for at least 30 days. 25 C.F.R. 2.19(b) (1985). If no party requested a transfer to the Board, the parties were deemed to have acquiesced in the Commissioner's jurisdiction after expiration of the thirty-day period. See *Urban Indian Council, Inc.* v. *Acting Deputy Assistant Secretary*, 11 Interior Bd. Indian Appeals 146, 153 (1983).

The general regulations governing appeals to the Department's various appeals boards established a formal appellate process. In particular, the regulations expressly barred ex parte contacts with the Board during the pendency of an appeal. 43 C.F.R. 4.27(b) (1985) ("There shall be no communication between any party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding, or an appeal, unless such communication (if written) is also furnished to the other party, or (if oral) is made in the presence of the other party."). In addition, the regulations limited the Board's appellate review to materials that were formally part of the record of appeal or subject to official notice. 43 C.F.R. 4.24 (1985).

By contrast, the regulations governing appeals to the Commissioner contained no prohibition against ex parte contacts and expressly provided that the Commissioner

could rely on "any information available to [him] * * * whether formally part of the record *or not*." 25 C.F.R. 2.20 (1985) (emphasis added). In other words, unlike the regulations governing appeals to the IBIA, "the agency has not granted anyone the right to be free of ex parte communications." *District No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n* v. *Maritime Admin.*, 215 F.3d 37, 43 (D.C. Cir. 2000).[12]

The Tribe acknowledged that it was aware of the regulation allowing transfer from the Commissioner to the Board after 30 days. J.A. 12. The Tribe, however, never exercised its option to transfer the appeal from the Commissioner to the Board, and it thereby foreswent the more formal procedures—including the explicit prohibition on ex parte contacts—that would have applied to proceedings before the Board. In any event, as in the case of the other procedural rules discussed above, a rule barring ex parte contacts during an administrative appeal cannot fairly be interpreted as

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[12] The APA bars ex parte contacts in formal administrative proceedings "required by statute to be made *on the record* after opportunity for an agency hearing." 5 U.S.C. 553(c) (emphasis added); see also 5 U.S.C. 554(a). Commissioner appeals are, as discussed, *not* required only to be "on the record." In any event, the APA's ban on ex parte contacts in formal administrative proceedings is scarcely the type of duty that may be fairly interpreted to mandate the payment of damages if breached. Rather, it is just the sort of procedural duty that, consistent with the APA's carefully limited remedial scheme, does *not* trigger any damages remedy. See *Lane* v. *Peña*, 518 U.S. 187, 196 (1996) ("Under the provisions of the APA, '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' is expressly authorized to bring '[a]n action in a court of the United States seeking relief *other than money damages*.'") (quoting 5 U.S.C. 702)) (emphasis added by this Court); cf. *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

mandating the payment of money damages if breached. At most, the violation of such a rule could entitle a party who timely objected to such contacts to a remedy under the APA, such as vacatur of administrative action that was preceded by such contacts, but not to money damages.

3. Although the court of appeals did not believe it was necessary to link the Tribe's damages claims to a violation of a specific statutory or regulatory duty that, if breached, would mandate the payment of damages (an error which, in itself, warrants reversal), the Tribe now attempts to do so. But its effort fails. The Tribe asserts (Br. in Opp. 17) that "both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians." The statutory language in 25 U.S.C. 396b on which the Tribe relies, however, governs the circumstances in which the Secretary may *reject* the highest bid for *oil and gas* leases; the statute governing the *approval* of *coal* leases (25 U.S.C. 396a) does not contain any comparable language.

The regulation cited by the Tribe (25 C.F.R. Pt. 211 (2001)) was not promulgated until 1996, almost a decade *after* the events at issue in this case. Moreover, whereas that regulation now obligates the Secretary to find that a lease is "in the best interest of the Indian mineral owner" when it provides for a royalty rate *less* than the minimum rate for leases of federal coal, the regulation notably does not require the Secretary to make such a finding before approving a lease—like the lease amendments at issue here—that has a royalty rate equal to or more than the minimum rate. 25 C.F.R. 211.43(b) (2001). The governing regulations thus refute the notion that the Secretary is obligated by the IMLA to ensure that every proposed lease agreed to by a

Tribe will maximize the return to the Tribe. See *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989).[13]

Indeed, in stark contrast to the particular statutory and regulatory provisions at issue in *Mitchell II*, see 463 U.S. at 222, neither the IMLA nor the regulations that the Secretary has promulgated to give content to her powers and duties under that Act establish any specific duties governing the Secretary's approval of a lease or lease amendment, except to the extent that they establish a minimum royalty rate for coal leases (now set at the minimum rate for federal coal leases). 25 C.F.R. 211.15(c) (1985 & 1987); 25 C.F.R. 211.43(b) (2001); see Pet. 3 & n.1. The lease amendments at issue in this case met, and exceeded, the applicable minimum rate at the time that the amendments were approved in 1987. There is no further requirement in the IMLA or the regulations that the Secretary insist that parties to a proposed Indian mineral lease agree to a higher rate under particular circumstances, and such a requirement would be inconsistent with the central aim of the IMLA —to allow *Indian mineral owners* to negotiate their *own* lease terms, subject only to a backstop protection of approval by the Secretary. See Pet. App. 68a.[14]

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[13] Even if the IMLA did impose a duty on the Secretary to act in the best interests of Indian mineral lease owners, that would not automatically lead to the conclusion that a breach of such a vague and generalized duty would give rise to a claim for money damages. In *Mitchell I*, this Court held that the Indian plaintiffs failed to state a claim for money damages even though the statute in that case, the General Allotment Act, expressly obligated the United States to hold allotments "in trust for the sole use and benefit of [Indian allotees]." 445 U.S. at 541.

[14] The Tribe asserts (Br. in Opp. 20) that the Secretary also violated 25 C.F.R. 211.2 (1985). In pertinent part, that provision authorizes the negotiation of Indian mineral leases, and reserves to the Secretary the right "to direct that negotiated leases be rejected." *Ibid.* It also provides that negotiated leases shall be filed with the Indian agency after 30 days, unless that time is extended by the Area Director. The court of appeals did not rely on, much less find a violation of, Section 211.2. In any event, nothing about Section 211.2 lends itself to an interpretation that would mandate the payment of compensation for a violation. See also Pet. App. 26a-27a n.5 (Schall, J., concurring in part and dissenting in part).

The Tribe asserts (Br. in Opp. 6) that "[t]he process required by IMLA for Secretarial approval * * * requires an economic analysis [of a mineral lease] to determine if it were in the Tribe's best interest." But the Tribe does not cite any statute or regulation requiring such an analysis. Moreover, while the Secretary may choose to conduct her own economic analysis in deciding whether to approve a lease, judicial imposition of an economic-analysis requirement would be inconsistent with the statute's focus on permitting Indian mineral owners to negotiate their own rates, subject to the minimum rate. Requiring the Secretary to conduct her own economic analysis of every Indian mineral lease submitted for her approval would always require the Secretary to substitute her own judgment for that of the Indian mineral owner, and all but render the lease negotiations between the Indian mineral owner and private parties a technical formality.

4. The court of appeals made no effort to tie the alleged breaches of trust even to generalized duties imposed by the IMLA and the Secretary's regulations under that Act. In finding the breach of a fiduciary duty mandating damages, the court of appeals focused on the Secretary's actions in 1985 in connection with Peabody's administrative appeal of a decision that the parties later agreed to vacate (see Pet. App. 11a-12a), rather than the reasonableness of the royalty rate and

the full package of lease amendments that were actually agreed to by the parties and approved by the Secretary in 1987. The Secretary's actions with respect to the pending administrative appeal were governed by the Department's general procedural rules and the APA, which plainly do not authorize the payment of damages for a violation, and not by the IMLA provision (25 U.S.C. 396a) governing approval of Indian mineral leases or amendments. See pp. 29-31, *supra*. Moreover, the Tribe itself does not seek to set aside the lease amendments to which it agreed in 1987 because, as the Tribe recognized below, "there are many aspects of the renegotiated lease package that are favorable to the Navajo Nation." Pet. App. 50a.

C. Federal Involvement With Respect To Indian Mineral Leasing Does Not In Itself Subject The United States To The Tribe's Damages Claims

Instead of determining whether there was a violation of a specific statutory or regulatory provision that mandated the payment of damages for a violation, the court of appeals reasoned that the IMLA and the Secretary's implementing regulations gave the Secretary "control" over the management of the Indian resources at issue, and that the existence of such control gave rise to a duty on the part of the United States to manage those resources, which, if breached, would give rise to a claim for damages. See Pet. App. 5a; see also *id.* at 8a ("The [IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*, insofar as federal authority is retained."). That understanding of *Mitchell II* is fundamentally flawed and, if adopted, would vitiate the fundamental principles of sovereign immunity that govern this case.

1. To begin with, the degree of federal control present in *Mitchell II* with respect to timber management

on Indian lands was much greater than the degree of any control exercised by the Secretary with respect to coal leases. In *Mitchell II*, this Court went to great lengths to describe the "pervasive" control that the United States had expressly assumed with respect to Indian timber sales. 463 U.S. at 219; see *id.* at 220 ("regulations address[] virtually every aspect of forest management"); *id.* at 222 (statutes establish "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber"); *id.* at 225 (government has "assume[d] such elaborate control over forests and property belonging to Indians"); *id.* at 225 n.29 (discussing "pervasive federal control" in Indian timber management). As the Court of Federal Claims explained, "the level of management and control that the government has assumed over coal leases under IMLA" does not come close to the level of federal control that this Court identified in *Mitchell II*. See Pet. App. 54a; see also *id.* at 55a-59a.

In the IMLA, the United States has assumed certain fiduciary responsibilities with respect to the leasing of minerals on Indian lands, but that Act "does not unambiguously provide that the United States has undertaken *full* fiduciary responsibilities as to the management of [leased] lands." *Mitchell I*, 445 U.S. at 542 (emphasis added). To the contrary, the key provision of that Act transferred leasing authority from the Secretary *to the Tribes*. It provides that tribal lands "may, with the approval of the Secretary * * * , be leased for mining purposes, *by authority of the tribal council or other authorized spokesmen*." 25 U.S.C. 396a (emphasis added). Moreover, as the Court of Federal Claims explained, that provision squares with an important purpose of the IMLA—"to foster Indian self-determination," an "ideal" that is "directly at odds"

with the notion that the Secretary has full "*control* over leasing." Pet. App. 58a-59a; see *Crow Tribe of Indians* v. *Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981), amended, 665 F.2d 1390 (The IMLA gave "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary."), cert. denied, 459 U.S. 916 (1982).[15]

To be sure, another purpose of the IMLA is to see that Indian Tribes receive "a profitable source of revenue" from the leasing of mineral resources on their lands. *Cotton Petroleum Corp.*, 490 U.S. at 179. That conclusion is supported by the legislative history of the IMLA, which states in part: "It is not believed that the present law is adequate to give the Indians the greatest return from their property." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938). But as this Court admonished in *Cotton Petroleum Corp.*, 490 U.S. at 179, that statement cannot be given "talismanic effect." Even when

[15] See *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation* v. *Board of Oil & Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986) (noting that one of the purposes of IMLA was "to increase Indian authority in granting leases"); *BHP Minerals Int'l Inc.*, 139 Interior Bd. Land Appeals 269, 311 (1997) ("[W]hile maximization of tribal revenues was clearly one purpose behind * * * the IMLA * * * [e]qually important was the desire to give Indians a greater say in the use and disposition of the resources found on Indian lands.") (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-180 (1989)). That purpose is promoted by the IMLA. As this Court recognized in *Cotton Petroleum Corp.*, the legislative history of the IMLA makes clear that the statute was intended to make it *easier* for Tribes to engage in—and profit from—mineral leasing by eliminating obstacles placed on such leasing that did not apply to non-Indians. See *id.* at 179.

"[r]ead in the broadest terms possible," the relevant paragraph in the committee report merely "suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Ibid.* (quoting committee report).

The legislative history thus does not suggest that a Tribe has a right to renegotiate a lease—or to sue the United States—any time that it believes in retrospect that it did not receive the greatest possible return for its resources. Nor does it obligate the Secretary to second guess or disapprove leases that already have been negotiated and agreed to by a Tribe and a lessee on the ground that, in the Secretary's view, the royalty rate and other conditions agreed to by the parties would not maximize the Tribe's profits, or that an alternative set of lease terms would be more in the interest of the Tribe. The IMLA authorizes the Tribes to negotiate mineral leases with others. The Act's requirement of approval by the Secretary furnishes a general backstop protection, not a duty on the part of the Secretary independently to determine and impose on the parties the terms that she believes will maximize the return for one side of the negotiated transaction.

As discussed above, in *Mitchell I*, the General Allotment Act explicitly obligated the United States to act for the "*sole* * * * benefit" of the Indians, but the Court nonetheless concluded that it did not give rise to an obligation on the part of the United States that, if breached, would mandate the payment of damages. 445 U.S. at 541 (emphasis added). In the same vein, to the extent that the IMLA generally implies or contemplates that the Secretary will act for the benefit of Indian Tribes, or in the interests of Tribes, the existence of such a generalized duty does not in itself

authorize a damages action against the United States under the Tucker Act based on a claim that the Secretary erred in some particular way in implementing the IMLA.[16]

2. In any event, in *Mitchell II* this Court did not focus on the existence of federal control with respect to Indian resources *vel non*. Instead, in addition to pointing to the existence of a "pervasive" regulatory scheme, the Court emphasized that the government had specifically assumed "fiduciary *management* duties" with respect to Indian timber resources. 463 U.S. at 218 (emphasis added); see *id.* at 222 ("emphasizing the Secretary of the Interior's management duties" with respect to timber on Indian trust lands). For example, one statute in *Mitchell II* expressly provided that "[s]ales of timber 'shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs.'" *Id.* at 209 (citation omitted); see *id.* at 224. In addition, Congress mandated that, "[i]n performing this duty, the Secretary was specifically required to take

[16] The court of appeals relied on "the interests of the Indians" language in 25 U.S.C. 399 as evidence that IMLA "place[s] on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." Pet. App. 11a. But Section 399 is not a part of *the IMLA*. Section 399 was enacted almost 20 years before the IMLA, and authorized the Secretary to lease certain unallotted Indian lands for mining purposes under terms set by the Secretary, *without* input from the Indian tribes. The legislative history of the IMLA specifically notes that the Act was intended to correct Section 399's deficiencies, including with respect to the *lack* of control by Indian Tribes over the leasing of their mineral resources. S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, *supra*, at 2. In any event, even if Section 399 *were* a part of the IMLA, its reference to the interests of the Indians would not compel the conclusion here, any more than in *Mitchell I*, that the United States has breached a money-mandating duty owed to the plaintiff Tribe.

into account" several different factors, including "the highest and best use of the land" and the "present and future financial needs of the owner and his heirs." *Id.* at 222 (quoting 25 U.S.C. 406(a)); see *id.* at 220-221 (Congress imposed "strict[] duties upon the Government with respect to Indian timber management," including by "expressly direct[ing] that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'").

Congress has not imposed any comparable "fiduciary management duties" on the Secretary with respect to Indian coal leases. When the Secretary approves a lease (or an amendment to an existing lease), the IMLA and implementing regulations neither mandate that she establish a particular royalty rate or other terms, nor impose any specific standards that the Secretary must assure are satisfied before giving her approval. For example, the regulations that applied when Peabody filed its appeal in 1985 and the Secretary approved the lease amendments in 1987 provided only that the Secretary could not approve a lease with a minimum royalty rate of *less* than "10 cents per ton." 25 C.F.R. 211.17(c) (1985 & 1987).

The current regulations have increased the minimum royalty rate to 12 1/2 percent of gross proceeds—the rate that applies to coal leases on federal lands—and state that "[a] *lower* royalty rate shall be allowed if it is determined to be in the best interest of the Indian mineral owner." 25 C.F.R. 211.43(b) (emphasis added). The regulations do not refer to the Secretary's approval of a rate that is at least equal to the minimum 12 1/2 percent rate, much less require the Secretary to insist that the parties to a negotiation agree to a higher rate under particular circumstances. In other words, the structure of even the current regulations underscores

that the United States has *not* assumed any specific management duties with respect to the approval of a lease that contains a royalty rate at least equal to the minimum rate. See 56 Fed. Reg. 58,734, 58,736 (1991) (minimum royalty rate regulation provides "reasonable royalty rates").

D. The Common Law Of Trusts Does Not Supply A Right To Recover Damages Against The United States Under The Tucker Act

The court of appeals also erred in treating the United States as if it were a private trustee that may be liable in money damages to an Indian Tribe for breach of any of the common law duties cited by the court that might be applicable to a private trustee. See Pet. App. 11a-13a. As the Court of Federal Claims explained, the violations of the common law duties that it found "do not themselves confer jurisdiction on this Court, nor entitle [the Tribe] to money damages." *Id.* at 52a. That conclusion is compelled by the text of the Tucker Act, which, as explained above, requires a plaintiff to point to the violation of an "Act of Congress," or a "regulation of an executive department." 28 U.S.C. 1491(a)(1). Likewise, the court of appeals' reliance on the common law conflicts with this Court's focus in *Mitchell II* on whether the *statutes or regulations* at issue could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added).

This Court has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee who is governing by common law standards. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). The United States indeed occupies a unique relationship with the Indian Tribes, which has been

characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, give rise to legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for damages against the United States.

In determining whether an alleged error by the Secretary under a statute or regulation involving Indian affairs may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986); *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). The Indian Tucker Act, moreover, requires that the claims of Indian plaintiffs be placed on the *same* footing as the claims of non-Indian plaintiffs. See p. 22, *supra*. To the extent that the court of appeals held that the United States may be liable for damages based on application of common law trust principles, its decision puts the damages claims of Indian plaintiffs in a considerably different position than the damages claims of non-Indian plaintiffs, which must be squarely grounded on an "Act of Congress" or "regulation of an executive department." 28 U.S.C. 1491(a)(1).[17]

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[17] The Tucker Act states that, *inter alia*, the Court of Federal Claims has jurisdiction to entertain claims against the United States based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. See 28

At the same time, the court of appeals' decision would impose a regime that is at odds with the central goal of tribal self-determination. That goal is embodied in the text of the IMLA itself, which assigns to the Tribe, not the Secretary, the power and responsibility to lease tribal lands, subject only to the approval of the Secretary and compliance with specific standards set forth in the IMLA and the Secretary's implementing regulations. That goal also is reflected in one of the basic purposes of the IMLA, which was to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985), the cornerstone of modern Indian policy designed to facilitate tribal self-determination by "giv[ing] the Indians the control of their own affairs and of their own property," *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting 78 Cong. Rec. 11,125 (1934) (Rep. Howard)). And the tribal self-determination goal is confirmed by more recent legislation, such as the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450.

The court of appeals' decision, however, in effect would require the Secretary to look behind and second-guess the wisdom of virtually any minerals agreement negotiated by an Indian Tribe and a private party, applying vague and even conflicting concepts of the common law that might be enforced by a court of equity against a private trustee. Not only would such a practice undermine the independence and sovereignty

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U.S.C. 1491(a)(1). Congress could have added to the list a provision for claims based on a trust relationship with the United States. But it did not do so in either the Tucker Act or the Indian Tucker Act. See *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002) ("expressing one item of [an] associated group or series excludes another left unmentioned").

of Tribes. It also would interfere with the role of Congress, which has plenary power to legislate in the field of Indian affairs, *United States* v. *Kagama*, 118 U.S. 375 (1886), and thereby to prescribe the powers and duties of the Secretary with respect to tribal resources. In the circumstances presented here, Congress clearly has spoken, giving tribal governments control over their mineral leasing decisions, with the Secretary furnishing a general backstop protection to assure that the minimum standards prescribed by the IMLA or the Secretary's implementing regulations are met, rather than serving as an independent negotiator of lease terms that she believes would be more favorable, or more in the Tribe's interests. And Congress has assigned to the Secretary, rather than to courts considering damages claims, the authority to flesh out the manner in which the Secretary will perform functions that Congress has retained for her. See 25 U.S.C. 396d (authority to issue regulations).

Finally, to hold that the United States may be liable in damages for the violation of any duty discoverable in the interstices of the law of trusts would vastly expand the potential liability of the United States for breach of trust, not to mention conflict with bedrock principles of sovereign immunity discussed above. And it would leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid the imposition of damages claims. Nothing in this Court's sovereign immunity jurisprudence in general or its *Mitchell* decisions in particular supports the court of appeals' decision to go down that path, and thus transform the Court of Federal Claims into a court of equity, in which the United States may be found liable in damages for alleged violations of common law duties that have not

been assumed by the government in any statute or implementing regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF ON THE MERITS FOR RESPONDENT, THE NAVAJO NATION

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QUESTION PRESENTED

Federal statutes and regulations govern virtually every aspect of surface coal mining on Indian lands, under a statutory scheme designed to maximize tribal revenues from reservation lands. The question presented is:

Whether, under *United States v. Mitchell*, 463 U.S. 206 (1983), the Navajo Nation stated a claim for breach of trust cognizable under the Tucker Act and the Indian Tucker Act where the Department of the Interior suppressed a well-supported decision raising Navajo coal royalties from extremely low rates, deceived the Navajo Nation and withheld from it key information, forced it to negotiate at a decided disadvantage, and ultimately approved a lease of Navajo coal for far less than every federal study had found reasonable, all in violation of applicable statutes, departmental regulations, and the core trust duties of loyalty, candor, and care.

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BRIEF ON THE MERITS FOR RESPONDENT, THE NAVAJO NATION

STATUTES AND REGULATIONS INVOLVED

The following authorities establish comprehensive federal control and supervision over Navajo coal leasing and impose trust duties on the Government: two treaties between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849) and 15 Stat. 667 (1868); the Indian mineral leasing statutes, 25 U.S.C. §§ 396a-396g, 399, and implementing regulations, 25 C.F.R. pts. 211[1] and 216 subpart A and 43 C.F.R. pt. 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. pt. 169; the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640; the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA to Indian coal, 30 C.F.R. § 206.450 *et seq*. and 25 C.F.R. § 211.40 (applying 30 C.F.R. Chapter II, Subchapters A and C); and the Indian lands section of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. pt. 216, subpart B, and 30 C.F.R. pts. 750 and 955. These provisions are set forth in the Navajo Lodging, except for relevant provisions of the 1868 Treaty, the Navajo-Hopi Rehabilitation Act, and 25 U.S.C. § 399, set forth in the appendix to this brief. The Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, are set forth in the petition appendix at 86a.

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[1] Unless otherwise noted, references to the Code of Federal Regulations are to the 2001 edition. The Navajo Lodging includes regulations from both the 1985 and 2001 editions.

STATEMENT OF THE CASE

A. Introduction

The Navajo people occupy the largest Indian reservation in the country. Despite significant mineral wealth, the reservation lacks basic infrastructure needed to support a self-sustaining economy. The Navajo Nation government relies significantly on revenues from coal leasing to provide basic services.

Due to its high BTU content, low sulfur content, and favorable stripping ratio, the coal at issue here is "exceptionally valuable." J.A. 81, 86. The United States controls and supervises all aspects of its leasing. The United States arranged and approved a lease for this coal for a pittance (between 20¢ and 37½¢ per ton) in 1964, but reserved Interior Department authority in that lease to adjust the royalty rate after twenty years. J.A. 191, 194.

In 1984, the Bureau of Indian Affairs (BIA) exercised that authority and raised the royalty rate to 20%, based on two federal studies. J.A. 6-9. The lessee, Peabody Coal Company, appealed. After briefing and additional federal studies, the appellate decision maker prepared a final decision affirming the adjustment. J.A. 14-97. However, the Interior Department leaked the pending decision to Peabody before the decision maker could sign it. J.A. 155. Peabody sprang into action, retaining a close friend of the Secretary of the Interior to influence him *ex parte*. J.A. 101-03.

As a result of clandestine meetings with Peabody's agent in July 1985, the Secretary suppressed a well-supported decision to raise royalties from unconscionably low levels. The Department then concealed its actions from the Navajo Nation, misled it about the value of its coal, and forced it to negotiate with Peabody at a decided bargaining disadvantage. For the next two years, the Navajo Nation continued to receive virtually nothing for

its coal. Ultimately, in December 1987, after performing no further economic analysis, the Department approved lease amendments setting royalties at little over one-half the royalty rate that every federal study had found fair. These actions, taken out of "sympath[y]" for Peabody, J.A. 102, sacrificed the Navajo Nation's best single opportunity to move from a welfare economy toward self-sufficiency.

The Government does not contest these facts. J.A. 137-87.[2] The court below held that the Tucker Act and governing statutes afford a remedy for the Department's breaches of trust. The Navajo Nation respectfully urges this Court to affirm.

B. Factual Background

1. The relationship between the United States and the Navajo Nation is founded on two treaties. *See United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978). In the first, ratified in 1850, the Navajo Tribe submitted to the Government's "sole and exclusive right of regulating the trade and intercourse" with the Navajo. 9 Stat. 974. In exchange, the United States promised to give the treaty a "liberal construction" and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo people. *Id.* at 975. The second, ratified in 1868, defined a reservation within the Navajo homeland. 15 Stat. 667. The part of the reservation at issue here was added by Executive Order of May 17, 1884, I Charles J. Kappler, *Indian Affairs, Laws and Treaties* 876 (1904), and confirmed by Congress in the Act of June 14, 1934, ch. 521, 48 Stat. 960.

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[2] **Pages 137 to 187 of the Joint Appendix reproduces only agreed facts,** citing to the appendix filed in the Court of Federal Claims. *See* C.A. App. A1982-A2065, A2703-A2727.

The coal at issue here is held in trust by the United States for the Navajo Nation. Pet. Br. 4.

The United States has exercised control over Navajo mineral leasing from the beginning. Secretary of the Interior Albert Fall stated that Indians as a rule were "not qualified to make the most of their natural resources," and that the federal government should therefore control them. U.S. Dep't of the Interior, *Annual Report of the Secretary of the Interior for 1921* 8 (1921). Under such control, some Fall-era oil leases generated bonuses for the Navajo of only $1,000—but netted $300,000 in spoils for those submitting "dummy" bids. Kathleen P. Chamberlain, *Under Sacred Ground: A History of Navajo Oil, 1922-1982*, 46, 60 (2000). Secretary Fall created the Navajo Tribal Council in 1923 for the "sole purpose" of making oil and gas leases in favor of his associates.[3] Faced with unrelenting pressure from Fall and the Standard Oil cartel, this first Council, whose delegates "were generally chosen by the [BIA] Superintendents," capitulated. *See* Chamberlain, *supra*, at 33-35; Kelly, *supra* note 3, at 69.

Congress' call for greater tribal self-determination in the 1930s fell on the deaf ears of federal agents in charge of the Navajo. *See* Young, *supra* note 3, at 93-94, 99-100. Federal regulations approved in 1938 retained provisions allowing only the BIA to call the Navajo Tribal Council into session. *Id.* at 113. As late as 1970, the Council "remain[ed] structurally and functionally dependent upon and responsive to . . . the Department of Interior." Aubrey W. Williams, *Navajo Political Process* 26 (1970).

[3] Robert W. Young, *A Political History of the Navajo Tribe* 55-58, 89-90 (1978); Chamberlain, *supra*, at 18-28, 50; *see generally* Lawrence C. Kelly, *The Navajo Indians and Federal Indian Policy: 1900-1935* 55-63 (1968).

2. In August 1964, the Department arranged and approved a lease of Navajo coal with a Peabody affiliate. *See* J.A. 210; Navajo Nation's Mot. for Summ. J., Court of Federal Claims docket no. 168, Vol. III at 1790. The lease set an "extremely low royalty rate," Pet. App. 36a,[4] but reserved for the Secretary unilateral authority to adjust that rate after 20 years. J.A. 194. In 1978, the Department's Office of Audit and Investigation pointed out the unfairness of the lease, under which the Navajo had received less than $2.7 million in royalties for coal resold by Peabody for over $141 million. J.A. 138. It urged the BIA "to exercise its trust responsibility and attempt to have these leases amended." *Id.* In March 1984, after several years of fruitless negotiations with Peabody, *see* J.A. 138-39, 143, and five months before the 20-year anniversary of federal approval of the lease, the Navajo Nation requested Interior Secretary William Clark to adjust the royalty rate. J.A. 139-40.[5] The BIA's Navajo Area Office responded, assuring the Navajo that the BIA was "pursuing our responsibility . . . by implementing an adjusted royalty rate as called for by the said lease." J.A. 140.

The Area Office sought technical advice from the Bureau of Mines and the BIA's Division of Energy and Mineral Resources (BIA's Minerals Division). J.A. 140-41. The Bureau of Mines recommended adjusting the royalty rate to 20%; BIA's Minerals Division to 24.4%. J.A. 6-7. On June 18, 1984, relying on the Bureau of Mines, the Area

[4] The royalty rate in the lease was capped at 37½ cents per ton. J.A. 191. In 1984, the coal commanded a market price of around $18 per ton, equating to a royalty rate of about 2%. *See* Pet. App. 2a.

[5] Contrary to Peabody's suggestions, there was nothing wrong with the Navajo Nation communicating with its trustee before commencement of adversarial proceedings. *See Joint Bd. of Control v. Acting Portland Area Director, BIA*, 22 IBIA 22, 25 & n.4 (1992).

Director notified Peabody that the royalty rate was adjusted to 20%, effective August 1984, twenty years after the Departmental lease approval. J.A. 8-9, C.A. App. A453.

Peabody and its two utility customers (the Southern California Edison Company (Edison) and the Salt River Project (SRP)[6]) appealed, invoking the formal appeal procedures of 25 C.F.R. pt. 2. J.A. 142. The appeal went to Deputy Assistant Secretary (and Acting Commissioner) for Indian Affairs, John Fritz. J.A. 143. Fritz stayed the effect of the adjustment decision during the appeal, causing the Navajo to lose about $50,000 each day the appeal languished. C.A. App. A453; J.A. 141. Edison instructed its counsel to "proceed[ ] on maximum delay mode in the appeal." J.A. 143.

Eventually, Peabody filed a study concluding that a fair royalty rate would be between 5.57% and 7.15%. J.A. 144. This is about one-half the "absolute minimum" for Indian coal established as binding Departmental policy shortly after Congress set the minimum royalty for federal coal at 12½% in 1976. J.A. 135; *see* 30 U.S.C. § 207(a). The Navajo Nation urged affirmance or lease cancellation based on Peabody's ongoing lease violations. J.A. 144-45; *see* J.A. 138. The Navajo expert report showed that, with the 20% royalty, fuel costs for the two power plants using Peabody coal would remain "among the cheapest in the Southwest." J.A. 10-11.

The BIA's expert, Vijai Rai, Ph.D., examined the technical reports for Fritz and reported that "based on

[6] Edison operates the Mohave Power Plant near Laughlin, Nevada, which is fueled entirely by coal transported from the Peabody mine via a dedicated slurry pipeline. C.A. App. 1537. SRP operates the Navajo Generating Station near Page, Arizona, which is fueled entirely by coal transported from the Peabody mine via a dedicated rail line. *Id.*

data currently available, a 20% royalty rate determination appears reasonable and defensible." J.A. 145-46. However, Dr. Rai recommended that Peabody be given one more opportunity to show that the 20% rate was unreasonable. *Id.* Fritz agreed and in March 1985 requested Peabody to supply additional cost and revenue data. J.A. 146-50.

Peabody refused to supply the data, so Fritz sought further technical input from the Bureau of Mines. J.A. 151. Its mineral economist and its mining engineer produced another report and an addendum, J.A. 24-72, concluding that Peabody would achieve a rate of return from 20.1% to 32.4% if the 20% royalty rate were upheld. J.A. 151. Dr. Rai then examined the Bureau of Mines' work and produced his final report. J.A. 73-88, 152. Dr. Rai found that the "coal deposits under lease to Peabody are exceptionally valuable" and recommended affirmance of the 20% rate. J.A. 86-88. No federal study ever concluded otherwise. J.A. 134, 153.

In June 1985, the Solicitor's Office drafted the decision for Fritz affirming the 20% royalty rate. J.A. 153. In late June or early July, the decision was finalized, copied, and check-marked for mailing to counsel of record, and awaited Fritz' signature upon his return from military reserve duty. J.A. 89-97, 153. As Fritz testified, it was "teed up" for his signature. C.A. App. A1245.

3. However, someone in the Department leaked the pending decision to Peabody. C.A. App. A1089-A1090; J.A. 155. The Navajo were never told of it. J.A.344-45 (testimony of former Navajo attorney and now Arizona Superior Court Judge Michael Nelson); J.A. 154-55. Peabody immediately wrote to Secretary Hodel and asked him to take personal jurisdiction over the appeal, but its July 5, 1985 letter was routed directly to Fritz. J.A. 155. Edison directed Peabody to retain Stanley Hulett, a close friend of Hodel, to influence Hodel to jettison the royalty adjustment. J.A. 157-58. Peabody's counsel in the appeal, Greg

Leisse, prepared Hulett to discuss the merits of the appeal in *ex parte* meetings with Hodel; the merits of the appeal were to be a central issue in those discussions. J.A. 158.

A July 22, 1985 Peabody memorandum sets forth in detail what happened then. J.A. 101-05.[7] Peabody's President Ken Moore told his lawyers to meet with Hulett and to determine if he "possessed the type of influence which would be required." J.A. 101. After meeting with Hulett, Peabody's lawyers agreed to

> allow Mr. Hulett to proceed on Peabody's behalf. He subsequently met with both Mr. Fritz . . . and Secretary Hodel on at least two (2) occasions. Secretary Hodel was sympathetic to Peabody's concerns and agreed that the parties to the lease should be encouraged to work out an agreeable resolution of the lease without interference from the Bureau of Indian Affairs. He agreed to, and subsequently did, sign a memo—drafted in part by Greg [Leisse] and myself—addressed to Mr. Fritz instructing him to (1) not make an untimely [sic] decision on the appealed case itself, and (2) encourage the parties to negotiate their differences.

J.A. 102.

Though unaware of these improper meetings,[8] the Navajo Nation's counsel did receive a copy of Peabody's July 5, 1985 letter to Hodel. J.A. 161. Navajo legal counsel

[7] Peabody immediately identified this memorandum internally as responsive to discovery subpoenae in this case, but concealed it for the next 2½ years, "agreements of counsel and court orders notwithstanding." *Navajo Nation v. United States*, 46 Fed. Cl. 353, 354 (2000), *aff'd*, No. 00-5072, 2002 WL 312117 (Fed. Cir. Mar. 29, 2001).

[8] As Hulett testified, "I had no contacts with the Tribe at that point that it would have made any sense for me to pick up the phone and say hey, oh, by the way, I'm going to do this to you." J.A. 160-61.

objected and repeated the Navajo's request that the Department decide the appeal. *Id.* The Solicitor's Office was then also unaware of the Secretary's deal with Peabody and, in response to Peabody's July 5 letter, simply added a paragraph to the decision rejecting Peabody's request. *Id.*; J.A. 113-14. On July 15, 1985—the same day that Peabody drafted Hodel's instructions—Assistant Solicitor Field "sent forward for signature" the revised decision affirming the royalty adjustment. J.A. 104-05, 106-16, 161-62.

Before Fritz could sign the decision, he received instructions from Hodel not to do so. J.A. 162-63. With the exception of one word, the body of Peabody's draft instructions had simply been retyped on Secretarial letterhead. *Compare* J.A. 104-05 *with* J.A. 117-18. Peabody was informed immediately of Hodel's instructions. *See* J.A. 101-02. The Department concealed these events from the Navajo. *See* Pet. App. 11a-12a, 32a, 40a-41a, 46a-47a.

Navajo Chairman Peterson Zah had also responded to Peabody's July 5 letter, again urging that the appeal be decided. J.A. 119-21. Associate Solicitor for Indian Affairs Tim Vollmann, ordered to respond to Zah, learned of Hodel's instructions and became "uncomfortable." J.A. 165. Vollmann sought an opportunity to brief the Secretary. J.A. 122. He warned that if the Navajo Nation learned of the instructions, it would likely sue. *Id.*

But Hodel's instructions were clear. J.A. 164. "[Y]ou would have to be brain dead not to understand what this is telling you. You're going to go back and consider this until hell freezes over is what you're going to do." C.A. App. A1648 (testimony of Deputy Assistant Secretary and Director of the Office of Trust Responsibilities Frank Ryan). Accordingly, Vollmann, a month after expressing his serious concerns about Hodel's actions, responded to Zah, stating that "a decision on the appeal is currently

being considered by the Deputy Assistant Secretary—Indian Affairs and his staff." J.A. 124-25. Both Vollmann and the drafter of his letter knew this was false. J.A. 122-23, 135-36, 168-69.

Vollmann's letter misled the Navajo leadership, who thought that it, coupled with a message that Hodel wanted negotiations begun anew, signaled that the Department could not support the 20% figure *on the merits*. J.A. 343, 358-59 (testimony of Judge Nelson); C.A. App. A3149-50. By contrast, Edison's 1985 negotiation notes show full disclosure by the Department to Edison. J.A. 126. Because of the Department's disloyalty and dishonesty, "the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." Pet. App. 51a-52a; *see* J.A. 354-61 (testimony of Judge Nelson).

Peabody then reiterated its previous offer to raise the royalty rate to 12½%. *See, e.g.*, J.A. 17. The Navajo Nation rejected that offer in July 1986. C.A. App. A1563. In early 1987, a new Navajo administration sought to learn the status of the appeal through the BIA's Navajo Area Office. J.A. 170. The Area Director inquired, but was refused a status report, the only time that this happened in his career. *Id.*

4. During the two and one-half years of negotiations after Hodel's intervention, the Navajo Nation continued to receive negligible royalties. The Department knew the Navajo would get "beat up" in the negotiations. C.A. App. A1279-A1280 (Fritz testimony); C.A. App. A1643-A1644 (Ryan testimony); J.A. 185. But the Department continued to conceal from the Navajo both the *ex parte* deal and the federal studies supporting the 20% rate generated by the Bureau of Mines and Dr. Rai during the administrative appeal. J.A. 166-69, 359; C.A. App. A1284. In forcing those negotiations, the Department violated regulations prohibiting mineral lease negotiations unless desired by Indians

and generally restricting negotiations to thirty days. *See* 25 C.F.R. § 211.2 (1985); J.A. 174-75.

Facing "severe economic pressures," Pet. App. 3a, the Navajo Nation eventually caved in to Peabody's proposal for a facial royalty rate of 12½% and, considering other factors unique to this transaction, an effective royalty rate even less than that minimum rate for federal coal. *See* J.A. 181; C.A. App. A1973. This was considerably less than the 17.08% that the United States had set in readjusting one of its *own* coal leases just a year earlier, *see Peabody Coal Co.*, 93 IBLA 317 (1986), and little over half the 20% royalty rate that all federal studies had found reasonable for the superior Navajo coal, *see* J.A. 14-88. Furthermore, contrary to the Government's assertion, Pet. Br. 9, because of a pre-existing tax waiver on coal used at the Navajo Generating Station, which consumes over half the Peabody coal, the *total* of Navajo taxes and royalties for that coal cannot exceed 12½% under the lease amendments, much less approach the 20% figure found by the Department to be a fair royalty just for the coal. J.A. 179. SRP estimated the Navajo Nation's loss of royalty income just for the coal used at the Navajo Generating Station at $347.5 million. J.A. 156.

Numerous other provisions of the negotiated lease amendments also substantially harmed Navajo interests, contrary to the Government's suggestions. For example, the amendments eliminated the "extremely valuable" provision for future Secretarial adjustment in favor of neutral arbitration, *see* J.A. 178, 186, 286-87; they required the Navajo to forfeit $56 million in back royalties, Pet. App. 44a; and they leased an additional 90 million tons of Navajo coal for insubstantial bonuses and at the facial 12½% royalty rate. J.A. 279-81. The Navajo Nation also granted valuable tax concessions to get the facial 12½% deal, relinquishing $33 million in valid back taxes, Pet. App. 44a; and both confirming old tax waivers and granting new ones, J.A. 293-94, 298-301. The Department

knew that the Navajo Nation "gave up something for nothing" here, but did nothing. C.A. App. A2865 (Ryan testimony), A1661.

5. The Navajo Nation sought BIA review of the lease amendments. J.A. 172. The Navajo Area Office invoked normal procedures and requested review by the BIA's Minerals Division to determine if the proposed amendments provided proper benefits to the Navajo. J.A. 172-73. It did not receive any response. J.A. 173.

This was because the merits of the transaction were irrelevant to high-level DOI officials. J.A. 176. The approval process was described by Ryan as follows: "And my shop, what are we doing? We can't help, because we are not supposed to help .... The way this happened was, we were rubber stamping a review of a bunch of [lease] amendments that we weren't supposed to review...." C.A. App. A1659-A1661; J.A. 173.

Assistant Solicitor Field "assisted Peabody in shepherding the amended leases through the Department." J.A. 173. He assigned legal review of perhaps the largest Indian mineral transaction in history to an inexperienced lawyer who had just joined the Solicitor's Office. J.A. 173. Field did not inform that lawyer of the decision Field himself had forwarded for Fritz' signature, and the new attorney "didn't have the time" to review the reports generated by BOM and E&M in the royalty appeal. J.A. 174. His first memorandum observed that the lease amendments violated three regulations, including the one that should have governed the negotiations. J.A. 174.

On November 24, 1987, the Navajo Area Office recommended approval based on the erroneous belief that BIA's Minerals Division had performed an "in depth technical review" of the lease amendments. J.A. 175. A last-minute effort to generate a "technical review" on December 2, 1987 was simply a file-papering exercise. *See*

J.A. 176-80. Had the reviewer been informed just about the tax waiver for the coal used at the Navajo Generating Station, he would have recommended disapproval. J.A. 179. The irrelevance of this exercise was underscored when he delivered his review the day *after* Secretary Hodel promised Peabody's Vice President that he would approve the lease amendments, without any review. J.A. 132.

The lease amendment package went to Ryan, and a memorandum recommending approval was drafted for his signature. J.A. 182. Ryan refused to sign: "I knew—well, I thought that I would be participating in a breach of trust." J.A. 183. The package went forward anyway. J.A. 184. Assistant Secretary Ross Swimmer signed a memorandum prepared by Peabody and Field recommending approval. J.A. 185. After another meeting with Peabody executives, Hodel signed the Secretarial Approval document, also prepared in part by Peabody. J.A. 186. The Area Director's 20% royalty adjustment decision was vacated four days later. J.A. 186-87. Three days after that, SRP determined that "the impact of the approval of the new lease amendments should be negligible." J.A. 187.

C. Course of Proceedings

The Navajo Nation filed this suit in 1993. The Court of Federal Claims was outraged by the Government's misconduct:

> The basic duties owed a beneficiary by a trustee are clear—care, loyalty, and candor .... Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic fiduciary duties. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and

> then mislead the beneficiary concerning these events.

Pet. App. 48a-49a. However, the court dismissed for lack of jurisdiction.

The Court of Appeals for the Federal Circuit reversed. It determined that federal control and supervision over all aspects of Indian coal leasing establish a "clear and unqualified" duty to "manage the mineral resources for the benefit of the Indians." Pet. App. 11a. The Federal Circuit concluded that "[IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II* [*United States v. Mitchell*, 463 U.S. 206 (1983)]," Pet. App. 8a, and found that all of the Department's revenue-minimizing activities, from its collusion with Peabody to its rubber-stamp approval of the lease amendments, violated compensable fiduciary duties. Pet. App. 11a-12a.

In a separate opinion, Judge Schall concurred in the judgment. In Judge Schall's opinion, the Department's "failure to perform an economic analysis on the Agreement between Peabody and the [Navajo] Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 [(1985)] . . . amounted to a breach of a fiduciary obligation owed to the Nation" mandating compensation. Pet. App. 30a.

SUMMARY OF ARGUMENT

Congress has expressly provided a remedy in damages for Indian claims founded on treaties, statutes, or regulations. 28 U.S.C. §§ 1505, 1491(a)(1). If those treaties, statutes or regulations give the Government control or supervision over a tribal trust resource, they impose fiduciary duties to manage that resource for the benefit of the Indian beneficiaries, and form the "contours" of trust duties enforceable in the Court of Federal Claims. *Mitchell II*, 463 U.S. at 224-26.

There is no principled distinction between the statutory scheme governing Indian coal at issue here and that governing Indian timber in *Mitchell II*. Both statutes allow the Indian owners to convey the resource, but condition that ability on the Secretary's approval. In both cases, the Secretary exercises comprehensive control and supervision over virtually every stage of resource development. Both regimes are designed to assure that the Indians receive the greatest benefits the resource can reasonably generate. Thus, here, as in *Mitchell II*, the statutes and regulations that establish the Government's fiduciary obligations over Indian resource management should be interpreted as mandating compensation by the Government for damages sustained from breaches of basic trust duties.

To find liability, the Court of Appeals properly determined the contours of federal trust duties by examining the applicable statutes and regulations. It properly considered trust law standards to measure the Government's performance of its duties, consistent with an unbroken line of this Court's cases and with congressional intent, evidenced both in the Indian Tucker Act and in legislation requiring federal approval of Indian mineral transactions.

Under applicable statutes, the Secretary had a duty to control and supervise Navajo coal leasing for the Navajo Nation's benefit, not for the benefit of third parties. The Secretary breached those duties by scuttling a final decision upholding a 20% royalty rate adjustment, forcing the Navajo Nation back into extended negotiations contrary to his own regulations, and abusing his approval power under 25 U.S.C. § 396a by approving a mineral lease without analysis for a royalty rate far below what every federal study had concluded was reasonable. Liability must follow. "Spoliation is not management." *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937) (Cardozo, J., for a unanimous Court).

ARGUMENT

I. THE GOVERNING STATUTES, REGULATIONS, AND LEASE ESTABLISH TRUST DUTIES FOR FEDERAL MANAGEMENT OF NAVAJO COAL AND MANDATE COMPENSATION FOR BREACH OF THOSE DUTIES HERE.

A. The Tucker Act Waives Sovereign Immunity for Claims Founded on Statutes, Treaties, and Regulations Under Which the Government Exercises Trusteeship Over Indian Resources.

The Indian Tucker Act confers jurisdiction in the Court of Federal Claims over tribal claims arising under federal laws or treaties or "which otherwise would be cognizable in the Court of Federal Claims." 28 U.S.C. § 1505. Under the Tucker Act, such claims include those "founded either upon ... any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). *Mitchell II* held that the Tucker Act waived the Government's immunity for claims of breach of trust concerning federal management of Indian resources. "[S]tatutes and regulations [that] ... establish fiduciary obligations of the Government in the management and operation of Indian lands and resources ... can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." 463 U.S. at 226. In other words, such statutes and regulations provide proper predicates for jurisdiction in the Court of Federal Claims under the Tucker Act.

Mitchell II honored congressional intent. *See id.* at 214-15 & n.13. Congress enacted the Indian Tucker Act in 1946 as section 24 of the Indian Claims Commission Act. The House Report on that legislation is clear. "If we fail to meet these obligations by denying access to the courts when ... fiduciary duties have been violated, we

compromise the national hon r of the United States." H.R. Rep. No. 1466, at 4 (1945), *quoted in Mitchell II*, 463 U.S. at 215. In urging passage, sponsor Henry M. Jackson likewise stressed that "[t]he Interior Department itself suggested that it ought not be in a position where its employees can mishandle ... lands of a national trusteeship without complete accountability." 92 Cong. Rec. at 5312 (1946), quoted in *Mitchell II*, 463 U.S. at 214 n.13. The Government's position here contravenes this clear congressional intent as well as its own position at the time of enactment, and would "import immunity back into a statute designed to limit it." *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955); *Hearings on H.R. 1198 and H.R. 1341 Before the House Committee on Indian Affairs (Hearings)*, 79th Cong., 1st Sess. 130 (1945) (statement of Assistant Solicitor Felix Cohen).

The legal context in 1946 provides further support for *Mitchell II*'s conclusion that Congress intended a damage remedy for breaches of trust regarding Indian resource management. In 1946, an 1863 statute was understood to bar Indian tribes from suing in the Court of Claims to vindicate rights under federal law. *Mitchell II*, 463 U.S. at 214; H.R. Rep. No. 1466, *supra*, at 5. Tribes obtained such redress by securing special jurisdictional acts from Congress; between 1836 and 1946 Congress passed 142 such acts. F. Cohen, *Handbook of Federal Indian Law (Handbook)* 563 (1982). Before 1946 Congress also had to review the recommendations of the Court of Claims and appropriate the necessary funds. *See United States v. Dann*, 470 U.S. 39, 47 (1985). This pervasive congressional involvement with Indian claims bolsters the presumption that Congress knew the preexisting law when it enacted the Indian Tucker Act in 1946. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979).

The law in 1946 included (1) this Cour decisions in special jurisdictional act cases that held th Government liable for breach of fiduciary duties, established standards

of conduct, and emphasized trust duties of loyalty and care;[9] (2) Court of Claims decisions awarding damages for breach of trust in such cases;[10] and (3) the overlay of the Court's general philosophy of *ubi jus ibi remedium*, *see Bell v. Hood*, 327 U.S. 678, 684 & n.6 (1946). Here, context "clarifies text," *see Alexander v. Sandoval*, 532 U.S. 275, 288 (2001): Congress intended and expected that claims brought under the Indian Tucker Act would be decided under the rules established by this Court's decisions in special jurisdictional act cases which awarded damages for violations of federal trust duties and held Government officials to basic trust law standards.

The Government argues that Indians should be treated no differently than other claimants under the Tucker Act. *E.g.*, Pet. Br. at 22. Certainly, Congress sought to allow Indians equal *access* to the courts, but that does not mean that the substantive law on which tribal claims are predicated must be identical to that which would apply if there were no trust relationship. The relationship between the United States and Indian tribes is unique, "perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). It is "dominated" by a "'distinctive obligation of trust incumbent upon the Government.'" *Mitchell II*, 463 U.S. at 225 (citation omitted). Thus, the lives and properties of Indians are subject to an entire title of the United States Code

[9] *E.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 296-97 & n.12 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 115-17 (1938); *Klamath & Moadoc Tribes v. United States*, 296 U.S. 244, 255 (1935); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935).

[10] *See, e.g.*, *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 18-19, 40 (1944) (tribal negotiation of contracts "does not exonerate the Government from its responsibility" concerning their approval), discussed in H.R. Rep. No. 1466, *supra*, at 4. *See generally Hearings*, *supra*, at 73 ("A good many cases have come about where the Government has failed to discharge its duties as trustee properly.") (statement of Assistant Secretary McCaskill).

and to implementing regulations "derived from historical relationships and explicitly designed to help only Indians." *Morton v. Mancari*, 417 U.S. 535, 552 (1974). The Court of Federal Claims has jurisdiction over Indian claims of breach of trust founded on federal statutes that impose federal control over Indian trust resources, even though such statutes apply only to Indians.

The Government contends that to satisfy 28 U.S.C. § 1491(a)(1) an Indian claiming a breach of trust must show *both* federal control or supervision over the Indian property, giving rise to an active trust relationship with respect to that property, *and* "that the government violated a statute or regulation that would clearly mandate the payment of damages." Pet. Br. 16.[11] But as this Court explained in *Mitchell II*, if a statute or regulation is found to establish such a trust relationship with respect to Indian property—by giving the Government control or supervision over that property—that statute or regulation itself "can fairly be interpreted as mandating compensation for damages sustained," *Mitchell II*, 463 U.S. at 226, thus giving rise to trust duties enforceable under the Tucker Act. This is so, the Court went on, because "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *Id.; cf. United States v. Winstar Corp.*, 518 U.S. 839, 887 n.30 (1996) ("'Every breach of contract gives the injured party a right to damages against the party in breach . . . .'") *citing Restatement (Second) of Contracts*, § 346 Comment a (1981). In short, once an active trust relationship is found to arise from the statutory scheme, there is no need to go back and look for a separate "money mandating" statute or regulation to state a claim cognizable under the Tucker Act.

[11] The Government made essentially this argument, unsuccessfully, in *Mitchell II*. *See* Brief for the United States, No. 81-1748, at 19, 46-48; Reply Brief for the United States, No. 81-1748, at 2, 4, 8.

The Government's argument that the Tucker Act requires IMLA and other governing statutes and regulations to waive the Government's sovereign immunity, *e.g.*, Pet. Br. at 24, is unfounded. As the Court stated in *Mitchell II*, "[b]ecause the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218-19. The Government's conflation of jurisdiction and the existence of a cause of action here reflects its "persistent confusion over the meaning of 'jurisdiction' as that term applies to claims against the United States under the Tucker Act." *Palmer v. United States*, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999). Rather, as the Government conceded below, "[t]here is thus no question that the Court of Federal Claims had subject-matter jurisdiction over the Navajo's complaint . . . ." Brief of the United States, No. 00-5086, at 2.

B. The Statutes and Regulations That Govern Every Aspect of Indian Coal Leasing Parallel Those in *Mitchell II*.

Mitchell II recognized that "[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute . . . ." 463 U.S. at 225 (citation omitted). Federal statutes and regulations govern virtually every aspect of coal mining activities on Navajo land, from the creation of leases to the reclamation of land. As the Court of Appeals determined, Pet. App. 8a-11a, this statutory scheme parallels that involved in *Mitchell II*.

1. Like the Indian timber at issue in *Mitchell II*, Indian minerals may not be conveyed without prior Secretarial approval. *See* 25 U.S.C. §§ 396a, 406(a). This requirement is rooted in federal statutes and policies going

back to the beginning of the Republic. *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 668 (1974). Congress has retained this "strong shield of federal law to the end that [Indians] be not overreached or despoiled in respect of their property of whatsoever kind or nature." *Sunderland v. United States*, 266 U.S. 226, 234 (1924). Exercising its war and treaty powers, "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence." *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).[12] The Secretary's power to approve leases was therefore " unquestionably . . . given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation." *Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918). The approval authority in IMLA must be construed in light of this clearly established law and tradition. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (examining context to construe Indian treaty).

Until 1891, there was no general law authorizing mineral leasing of Indian lands. *See Indian Leases*, 18 Op.

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[12] That was especially true of the Navajo. The United States promised in the 1868 Treaty to provide schools and teachers, 15 Stat. at 669, but the Government defaulted on that obligation, 26 Cong. Rec. 7703 (1894). In 1947 "over 66% of the Navajo people had no schooling whatsoever and the median number of school years for the Navajo population was less than one." Robert W. Young, *Navajo Yearbook* 1 (1957). Thus, in 1964 when the Navajo Tribal Council considered a possible percentage-based royalty for the Peabody lease, at least one key Committee member did not understand the concept of a "percentage," and the Council accepted the cents-per-ton royalty that Peabody had proposed. *See* Navajo Nation's Mot. for Summ. J., Court of Federal Claims docket no. 168, Vol. I at 163; J.A. 191.

Att'y Gen. 486 (1886). Since then, Congress has enacted several laws doing so. Each requires affirmative Secretarial action for any lease to be effective.

An 1891 statute authorizes mineral leases of lands that Indians "bought and paid for . . . subject to the approval of the Secretary." 25 U.S.C. § 397. A 1924 statute amended the 1891 Act, authorizing leases of Indian lands for oil and gas to be offered "at public auction by the Secretary of the Interior." 25 U.S.C. § 398; *see Montana v. Blackfeet Tribe*, 471 U.S. 759, 763 (1985). Nonetheless, Secretary Fall attempted to lease lands withdrawn for exclusive Navajo use by executive order as if they were public domain lands. *See* Kelly, *supra* note 3, at 57. Then-Attorney General Harlan Fiske Stone disagreed with Fall. *See Executive Order Indian Reservations-Leasing Act*, 34 Op. Att'y Gen. 171 (1924). In 1927, Congress adopted Stone's position, providing that such minerals could be leased only "in accordance with the provisions" of § 398, *i.e.*, at an auction held by the Secretary for the Indians' benefit. *See* 25 U.S.C. § 398a.

Under a 1919 Act, the "Secretary of the Interior . . . is authorized and empowered . . . to lease" reservation land in Arizona and eight other states for metalliferous minerals. *See* 25 U.S.C. § 399, para. 1. That Act provides that leases "shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior." *Id.* at para. 6. The Act also authorizes the Secretary "to make such rules and regulations . . . as may be necessary and proper for the protection of the interests of the Indians." *Id.* at para. 17. Congress amended this Act in 1926 to allow leasing of coal and other "nonmetalliferous minerals, not including oil and gas" in Arizona and the other states, leaving intact the provisions protecting Indians' interests and providing for Secretarial lease adjustments after twenty years. Act of Dec. 16, 1926, ch. 12, 44 Stat. 922; *see* 25 U.S.C. § 399, para. 1.

Congress sought to consolidate and simplify mineral leasing procedures in the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g. IMLA's "basic purpose" is "to maximize tribal revenues from reservation lands," *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Congress enacted IMLA in large part because the earlier statutes were not "adequate to give the Indians the greatest return from their property." H.R. Rep. No. 75-1872, at 2 (1938). Contrary to the Government's bald assertion, Pet. Br. 44 n.16, IMLA did not repeal earlier leasing statutes such as those codified at 25 U.S.C. § 399. IMLA contains only a general repealer clause for inconsistent provisions. *Blackfeet*, 471 U.S. at 764.

Since enacting IMLA, Congress has enacted three statutes that reconfirm the Secretarial power to control Navajo mineral leasing. After World War II, Congress learned that 80% of Navajos were illiterate and 65% could not speak English, that all-weather roads were "practically nonexistent" on the reservation, that public health and other services were "completely inadequate," *see* H.R. Rep. No. 81-963, at 3-4 (1949), and that the Navajo were living in "abject poverty," S. Rep. No. 81-550, at 4-5 (1949). In response to these extremely bleak conditions, Congress enacted the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-640. That Act authorized the Navajo Tribe to lease its trust lands for "development or utilization of natural resources," 25 U.S.C. § 635, but conditioned that authority on the "approval of the Secretary of the Interior." *Id.* Congress enacted that law "to further the purposes of existing treaties with the Navajo Indians" and "to make available the resources . . . for use in promoting a self-supporting economy and self-reliant communities." 25 U.S.C. § 631.

In 1982, in the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-08, Congress both sought to extend a true measure of self-determination over the

disposition of tribal minerals and confirmed its view that a careless or disloyal exercise of the Secretarial approval duty under *IMLA* would subject the Government to liability. IMDA allowed tribes to negotiate minerals agreements, yet it, too, conditioned the validity of those agreements on Secretarial approval. 25 U.S.C. § 2102(a). The Department "strenuously oppose[d]" the bill unless a section were added "to hold the Secretary harmless from any damages based upon approval of any agreement." H.R. Rep. No. 97-746, at 13 (1982). Congress responded by confirming that Secretarial approval must promote "the best interest of the Indian tribe," 25 U.S.C. § 2103(b), by providing that nothing in the statute would "absolve" the United States from any trust duties, *id.* § 2103(e), and by exempting the Secretary from liability "for losses sustained . . . under [an] agreement" *only* "[w]here the Secretary has approved [the] Minerals Agreement in compliance with [IMDA] and any other applicable provision of law," *id.*

IMDA thus "simply restates the law" as it was under IMLA: "If the Secretary, acting as trustee, approves a lease . . . and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability." H.R. Rep. No. 97-746, at 7-8. The Government characterizes such exercises of trusteeship as "second-guessing." Pet. Br. 39, 43, 48, but Congress has consistently required substantive federal review of conveyances of Indian minerals.

Most recently, in 2000 Congress reaffirmed federal control over—and impliedly recognized federal liability for—the disposition of Navajo minerals. In the Navajo Nation Leasing Act, Congress granted the Navajo Nation final authority to lease its trust lands, "except a lease for exploration, development, or extraction of any mineral

resources" which remain subject to Secretarial approval. 25 U.S.C. § 415(e)(1). The Act also provides that "[t]he United States shall not be liable for losses sustained" by the Navajo Nation only regarding leases consummated under that Act. *Id.* § 415(e)(5). Congress has the sole prerogative of determining when federal trusteeship over Navajo minerals is no longer needed. *Bunch v. Cole*, 263 U.S. 250 (1923). It obviously believes that this federal protection is still warranted.[13]

2. In addition to its control over disposition of Indian minerals, the Government exercises comprehensive supervision over those resources. IMLA is "comprehensive legislation" that "detail[s] uniform leasing procedures designed to protect the Indians." *Blackfeet*, 471 U.S. at 763-64. Under that Act, the Secretary has issued "comprehensive regulations," *Kerr-McGee*, 471 U.S. at 199, and exercises supervisory authority over Indian mineral leasing "in considerable detail," *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968). Federal "statutes and regulations govern[ ] virtually every aspect of [Peabody's] coal mining activities, from the creation of its leases to the reclamation of land." *Peabody Coal Co. v. State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988), *cert. denied,* 490 U.S. 1051 (1989); C.A. App. A3392-A3435.

• *Leasing and Operating Regulations.* Congress delegated rulemaking authority to the Secretary in IMLA. 25 U.S.C. § 396d. Under the Secretary's IMLA regulations, the BIA comprehensively supervises coal exploration permits, lease negotiations, bonding, the size and shape of leases, specific lease terms, approval or disapproval of

[13] So does the Department, which rejected proposals for greater deference to tribal leasing decisions under § 415, explaining "existing statutory authorities require meaningful review by the Secretary in carrying out the trust responsibility." 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001).

leases and mining plans, rental and royalty payments, permission to commence mining, promulgation and enforcement of "operating regulations," penalties for noncompliance with leases and regulations, and lease cancellation. 25 C.F.R. pts. 211 and 216, subpart A; Pet. App. 9a-10a; C.A. App. A3393. The Department promulgated IMLA regulations to ensure that Indian mineral resources "will be developed in a manner that maximizes their best economic interests," 25 C.F.R. § 211.1(a), and to be "consistent with the Federal government's role as trustee for these mineral resources," 61 Fed. Reg. 35,634 (July 8, 1996).

• *Rights of Way.* The Government's supervision of Navajo land and minerals is also exercised through its control of rights-of-way, which the Secretary can grant with tribal consent, 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169; J.A. 139. The statutes and regulations governing rights-of-way across Indian lands also serve to protect the Indians' "best interests," 33 Fed. Reg. 19,803, 19,804 (Dec. 27, 1968), and give rise to enforceable trust duties, *Mitchell II*, 463 U.S. at 223.

• *Resource Evaluation and Recovery; Prevention of Waste.* BIA regulations delegate some IMLA responsibilities to the Bureau of Land Management (BLM). BLM supervises exploration, resource evaluation, approval of drilling permits and mining plans, mineral appraisals, mining operations, inspection and enforcement, and production verification for Indian coal. 25 C.F.R. § 211.4 (incorporating 43 C.F.R. pt. 3480). In performing these functions, BLM exercises "the trust responsibility of the United States." 61 Fed. Reg. at 35,641.

• *Royalty Management.* BIA regulations incorporate by reference requirements of the Minerals Management Service (MMS) that cover royalty collection, accounting, and audit. 25 C.F.R. § 211.40. In the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757, Congress specifically required the Secretary to

address "the adequacy of royalty management for coal . . . on . . . Indian lands." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes. The Secretary satisfied this congressional mandate by establishing the Auditing and Financial System in 30 C.F.R. pts. 212 and 218, and applying it to solid minerals retroactive to June 1985, *see* 51 Fed. Reg. 15,763, 15,765 (Apr. 28, 1986); and by adopting the Production Auditing and Accounting System in 30 C.F.R. pt. 216, *see* 51 Fed. Reg. 8,168 (Apr. 8, 1986). MMS promulgated these regulations "to ensure that the trust responsibilities of the United States are discharged." 30 C.F.R. § 206.450(d).

• *Surface Mining, Reclamation, and Enforcement.* BIA first established special rules governing surface mining on Indian lands under IMLA in 1969. *See* 34 Fed. Reg. 813 (Jan. 18, 1969). These rules govern all stages of Indian coal surface mining, including exploration, development, operations and reclamation. 25 C.F.R. pt. 216, subpart A. Under the Indian lands section of the 1977 Surface Mining Control and Reclamation Act, 30 U.S.C. § 1300, Congress augmented federal control over Indian coal mining and lease amendments. *See* 25 C.F.R. pt. 216, subpart B (1985); 30 C.F.R. pt. 750. These regulations were *also* promulgated to satisfy "the Department's legal role as trustee of the natural resources of the Indian tribes." 42 Fed. Reg. 18,083 (Apr. 5, 1977).

It is hence "quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities," as the Court of Appeals found. Pet. App. 10a.

3. *Mitchell II* held that a comprehensive statutory scheme governing disposition of Indian trust resources imposed fiduciary resource management obligations on the Government and could fairly be interpreted as mandating compensation for damages caused by Government

mismanagement. *See* 463 U.S. at 226. While the Government repeatedly—but without support—proclaims otherwise, the statutory and regulatory scheme governing Indian mineral leasing and development is no less comprehensive than the scheme governing Indian timber in *Mitchell II*. Both allow conveyances by Indian owners subject to Secretarial approval. 25 U.S.C. §§ 396a, 406(a). In both, virtually every stage of conveyance and development is under federal supervision. *Peabody Coal Co.*, 761 P.2d at 1099; *Mitchell II*, 463 U.S. at 222. In both, the Secretary, through his approval power and through regulations, controls the amount and collection of compensation due the Indians. *See* 25 C.F.R. § 211.43(a); 30 C.F.R. pts. 212, 216, 218; *Mitchell II*, 463 U.S. at 220-23. Both are intended to protect against improvident sales and waste of the resource. Pet. App. 9a-10a; C.A. App. A3392-A3428; *Mitchell II*, 463 U.S. at 221. The principal goal of both statutory schemes is to ensure that the Indians receive the maximum benefit from their trust resources. *Kerr-McGee*, 471 U.S. at 200; *Mitchell II*, 463 U.S. at 221-22.[14] The Court of Appeals' determination that the IMLA scheme is analogous to the *Mitchell II* statutory scheme, *see* Pet. App. 8a-10a, 12a-13a, conforms with this

[14] *Accord See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1570 (10th Cir. 1984) (Seymour, J., concurring and dissenting) (*Supron*), *concurring and dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (*en banc*), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986); *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982); *Dawn Mining Co. v. Watt*, 543 F. Supp. 841, 843 n.8 (D.D.C. 1982). The monetary character of the governing statute "is a strong indication that a statute in itself . . . can fairly be interpreted as mandating compensation." *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., dissenting) (internal quotation marks omitted).

Court's observations in *Blackfeet* and *Poafpybitty* and with decisions of all the other lower courts that have addressed the issue.[15]

Stare decisis mandates adherence to *Mitchell II* here and compels affirmance of the Court of Appeals' determination that the Navajo Nation's claim is cognizable under the Tucker Act. The doctrine of *stare decisis*, one "of fundamental importance to the rule of law," *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 494 (1987), has special force in cases of statutory construction. *E.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998). There has been no intervening change in the law nor any indication that *Mitchell II* has proved unworkable or fostered inconsistency in the law. *Cf. California v. F.E.R.C.*, 495 U.S. 490, 499 (1990); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Additionally, *Mitchell II* has been cited with approval in nine decisions of this Court and over 700 decisions of the lower courts. *Cf. California*, 495 U.S. at 499. Finally, only a faithful application of *Mitchell II* under *stare decisis* principles would be consistent with "'a sense of justice.'" *See Patterson*, 491 U.S. 174 (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921)).

[15] *See Supron*, 728 F.2d at 1564 ("the statutory and regulatory scheme in *Mitchell II* parallels that involved here") and 1565 (IMLA "regulations detail in exhausting thoroughness the government's management . . . responsibilities"); *accord Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993); *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv.*, 792 F.2d 782, 794 (9th Cir. 1986); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 238 (1985).

C. The Applicable Statutes, Regulations, and Lease Establish Fiduciary Duties to Manage Navajo Coal in Accordance with Indians' Best Interests and Basic Trust Law Standards.

The mineral leasing statutes and regulations, the lease, and the treaties form the contours of the Government's trust duties here. *See Mitchell II*, 463 U.S. at 225. Actions taken by it within those contours are actions taken in the Government's capacity as trustee, and should be judged by familiar trust law standards.

1. Both courts below determined that IMLA, its implementing regulations, and this Court's precedents "place on the federal official a clear and unqualified fiduciary responsibility to manage the mineral resources for the benefit of the Indians." Pet. App. 11a; Pet. App. 55a. These determinations are consistent with all of the reported decisions. *See supra* notes 14-15.

All relevant statutes provide that Secretarial oversight must be exercised in the Indians' best interests. *E.g.*, 25 U.S.C. §§ 396b; 399, para. 17; 631; 2103(b). That was the standard that the Department adopted in its Coal Leasing Policy on Indian Lands, in effect here at all relevant times. J.A. 2, 133-34. The "best interest" standard is a necessary incident of the IMLA scheme and purposes.[16] That standard is implicit in the restraint on alienation of Indian trust property.[17] It is inherent in the unique historic

[16] *See Blackfeet*, 471 U.S. at 763 (IMLA's provisions are "designed to protect the Indians"); *Poafpybitty*, 390 U.S. at 373-74 (referring to the Government's "trust duties" and "trust responsibility" under IMLA).

[17] *See, e.g., Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960) ("obvious purpose" of such restraint "is to prevent unfair, improvident or improper distribution by Indians of lands owned or possessed by them"); *Smith v. McCullough*, 270 U.S. 456, 464-65 (1926); *Anicker*, 246 U.S. at 119.

federal/Indian relationship against which Congress legislates. *See, e.g., Mitchell II*, 463 U.S. at 225-26; *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *Seber*, 318 U.S. at 715. A "best interest" standard is implicit in *any* trust relationship.

The Government here opposes reliance on the "best interest" requirement, whether in 25 U.S.C. § 399 or otherwise. Pet. Br. at 18, 33, 37-38, 44 n.16, 45. However, IMLA did not repeal, expressly or impliedly, that preexisting statutory requirement governing leases of nonmetalliferous minerals in Arizona such as Navajo coal. *See Blackfeet*, 471 U.S. at 764. Moreover, the Department formally adopted the "best interest" standard for *any* "administrative action affecting the interests of an Indian mineral owner . . . (such as approval of a lease . . .)," 25 C.F.R. § 211.3, both to conform with the Department's longstanding policy to "maximize [Indians'] best economic interests," 25 C.F.R. § 211.1(a), and to codify the holding of a 1982 case that the Department must "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands," *Kenai*, 671 F.2d at 387; *see* 61 Fed. Reg. at 35,634, 35,640. The Government forcefully argued for that very test below. C.A. App. A2993-97, A3191.

The Government contends that *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), indicates that the Secretary can ignore IMLA's basic purpose. *See* Pet. Br. 42. But that case concerned state taxation of non-Indian lessees, and the Interior Department has no responsibilities over state taxation of non-Indians. Moreover, in *Cotton*, "[i]mportant considerations of federalism took precedence over the Secretary's general duty to act on behalf of the tribe." *Burlington Resources Oil & Gas Co. v. Dep't of the Interior*, 21 F. Supp. 2d 1, 4 (D.D.C. 1998). No such considerations exist here, and the Department itself, both before and after *Cotton*, has ruled that it is duty bound to maximize tribal revenues under IMLA. *See*

General Crude Oil, 18 IBLA 326, 329 (1975); *Robert L. Bayless*, 149 IBLA 140, 150 (1999).

The Government's suggestion that it could have leased Navajo coal for 10¢ per ton based on a 1957 regulation, when the minimum royalty for federal coal was 12½% and when it knew that the proper royalty for the Navajo coal was closer to $4.00 per ton, *see* Pet. Br. 34, is disturbing and wrong. The Department's trust duty requires it "to review all leases and amendments to leases to assure that the rent and royalty received by the Indian tribe ... represents the best return that the market will bear." 3 *Am. L. of Mining* § 67.04[4][d], at 67-17 (1999). Thus, "the Secretary's discretion to approve or disapprove leases ... must be governed by fiduciary standards and limited by fiduciary duties." *Cheyenne-Arapaho Tribes*, 966 F.2d at 589. The United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate," to strive for the "ceiling" and not settle for the "floor." *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).[18]

2. "It is ... well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *Cherokee Nation*, 480 U.S. at 707. The commitments in the 1850 treaty indicate the Government's "willing assumption" of trust duties. *See supra* p. 3; *Supron*, 728 F.2d at 1563 n.1. The United States concedes that it must comply with basic trust duties. *See generally* Pet. Br.

[18] Peabody's amicus brief is predicated on a report that purportedly shows that "a royalty rate of 12.5% ... was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996." Peabody Br. at 2, 26-28. That assertion is false and its data are irrelevant. *See Peabody Coal Co.*, 93 IBLA 317 (1986); Navajo Nation's Reply to Opposition of Amici Peabody Coal Co., et al., to Motion to Strike Lodged Material; J.A. 83 (regarding inappropriateness of applying royalty rates for federal coal).

47 ("The United States fully accepts the implications of that [trust] relationship and the undertakings that go with it.").[19] However, it contends that the remedies available to Indians damaged by breaches of trust are limited to declaratory and injunctive relief, Pet. Br. 36-37, and that common law trust standards are irrelevant, *id.*, at 20, 49. *Mitchell II* rejected the first contention, *see* 463 U.S. at 227-28; *infra* pp. 47-49, and the second conflicts with congressional intent and an unbroken line of this Court's decisions, as discussed below.

The Government's duties over Indian mineral leasing are fiduciary in nature. *See Poafpybitty*, 390 U.S. at 373-74. In *Mitchell II*, the Court concluded that when governing statutes and regulations, like those here, impose on the United States "full responsibility to manage Indian resources and land for the benefit of Indians[, t]hey thereby establish a fiduciary relationship and define the *contours* of the United States' fiduciary responsibilities." 463 U.S. at 224 (emphasis added). "Contours" are outlines, providing a "framework for analysis." *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990); *see Faragher*, 524 U.S. at 788 (distinguishing "contours" from "definitive rules").

To fill in the "contours" of that relationship—in *Mitchell II*, to determine if a remedy in damages for breach existed—the Court relied on the three leading treatises regarding trust law standards. 463 U.S. at 225-26 & n.30. The *Mitchell II* dissent also understood that the "law of trusts generally will control." *Id.* at 237 n.11 (Powell, J., dissenting). The Court cited with approval several cases that relied on trust law standards to measure the Government's performance as trustee.

[19] The Government made the same statement in *Mitchell II*. Brief for the United States, No. 81-1748, at 44 ("We fully accept the implications of that special relationship and the obligations that go with it.").

First among those cited cases is *Seminole Nation v. United States*, 316 U.S. 286 (1942). The *Seminole* Court considered the Government's conduct as trustee in its disbursement of Indian monies. The Court could not have been clearer: the Government's conduct must "be judged by the most exacting fiduciary standards." *Id.* at 297. Significantly, the Court emphasized the duty of loyalty. "'A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.'" *Id.* at 297 n.12 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.)). The duty of loyalty is still enforced with "'uncompromising rigidity.'" *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981) (quoting same); *Pegram v. Herdrich*, 530 U.S. 211, 224-25 (2000) (quoting same). Adherence to that duty at the Interior Department is of "particular importance" because of the temptation to compromise Indian interests in favor of other policies and programs. *Handbook* at 227-28. *Mitchell II* cited with approval several other cases that rely explicitly on the *Seminole* standard or the common law of trusts (or both) to measure the Government's performance as trustee. *See* 463 U.S. at 226 n.31.

Similarly, in *United States v. Mason*, 412 U.S. 391 (1973), this Court relied on the law of trusts to measure the performance of the Government's conduct as trustee. *Id.* at 391-92. Citing *Seminole*, the Court first observed that "[t]here is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust." *Id.* at 398. The Court then measured the Government's performance of its duty of care with reference to trust law standards. *Id.* (quoting Scott treatise).

Furthermore, *Nevada*—decided just three days before *Mitchell II*—quotes *Seminole* in affirming that "[t]his Court has long recognized 'the distinctive obligation of

trust incumbent upon the Government' in its dealings with Indian tribes." 463 U.S. at 127 *quoting Seminole*, 316 U.S. at 296. *Nevada* also recognized that "[i]t may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States." *Id.* at 142. This case presents just such a situation.

Contrary to Petitioner's assertion, Pet. Br. at 46, *Nevada* held that the Government's management duties over Indian trust resources differ from those of a private trustee *only* where Congress "by statute" has imposed conflicting duties on the Government. 463 U.S. at 128, 142; *cf. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001). Congress has imposed no such conflicting duties here. Furthermore, even when Congress *has* imposed such conflicting duties, the Court has recognized that Indian tribes may obtain relief in the Court of Claims for the United States' fiduciary failures. *See Nevada*, 463 U.S. at 135 n.14, 144 n.16; *Arizona v. California*, 460 U.S. 605, 627 n.20 (1983). Subsequent decisions of this Court confirm that trust law standards measure the Government's performance as trustee. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *Cherokee Nation*, 480 U.S. at 707; *Dann*, 470 U.S. at 50 n.13.

The Government's argument that its fiduciary duties are, at most, coextensive with specific statutory and regulatory commands, is unfounded. For example, the Government notes that the Indian timber statute requires that "proceeds from timber sales 'shall be paid to the owner or owners or disposed of for their benefit.'" Pet. Br. 27 (quoting 25 U.S.C. § 406(a)). The Government thus suggests that the absence of such a specific command in IMLA allows it to divert proceeds from Indian minerals to any third party free of liability to Indian owners. That

pinched reading of the trust duty contravenes the reasoning and holding of *Mitchell II* and Congress' intent to provide monetary remedies for federal mismanagement of trust resources. "If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996).

By enacting the Indian Tucker Act, Congress understood that the courts would use strict standards to measure the Government's performance as trustee. *See supra* pp. 16-18. Indeed, in 1946 the conference committee struck a provision in the bill that became the Indian Tucker Act directing the courts to apply "the same principles of law as would be applied to an ordinary fiduciary" in cases under the Indian Tucker Act, explaining "it is well settled that without express language the United States owes a very high degree of fiduciary duty to Indian Tribes, and the bill, by section 24, provides 'That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands or groups.'" 92 Cong. Rec. at 10,402 (statement of House conferees on Conference Report). That proviso was added to preclude the Government's present misconstruction of the Indian Tucker Act. *See Hearings*, *supra*, at 127, 130-31 (testimony of Assistant Solicitor Cohen).[20] With this background, Congress should be understood to have imported established principles of trust law, *see Amax Coal Co.*, 453 U.S. at 329, at least as a starting point, *see Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000); *Varity Corp.*,

[20] That proviso was itself dropped "as surplusage" in the 1949 codification of that section as 28 U.S.C. § 1505, "since the provision conferring jurisdiction cannot in any way alter the relationship of the Government with its Indians." H.R. Rep. No. 81-352, at 15 (1949).

516 U.S. at 496-97; *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Where, as here, the scope of duty is a question of federal law and Congress has understandably not specified all acts or omissions that would constitute compensable breaches of trust, the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a "necessary expedient." *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985). Moreover, "the scope of the United States' fiduciary duty in administering the [Indians'] trust property is a question of federal law." *Mason*, 412 U.S. at 397 n.9. Such federal law requires nationwide legal standards; thus, the interstices of the remedial scheme will be filled with uniform *federal* rules. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), *cited in Mason*, *supra*.

The Government's fear that entrusting courts to fill in these contours will subject the United States "to liability based on unanchored, judge-made concepts of common law,"[21] is as unfounded in the trust law context as it is in the contract or tort law context.[22] It is precisely because

[21] Brief for the United States, *United States v. White Mountain Apache Tribe*, No. 01-1067, at 12, 34. The Government here simply paraphrases without attribution the words "unanchored judge-created principles of fiduciary law" that it borrowed from a dissenting Court of Claims judge and quoted in its unsuccessful *Mitchell II* brief. Brief for the United States, *United States v. Mitchell*, No. 81-1748, at 45.

[22] Once a contract claim passes Tucker Act muster, the dispute is governed by "federal common law of contract," Developments in the Law, *Remedies Against the United States and its Officials*, 70 Harv. L. Rev. 827, 884 (1957), under which breach and remedies issues are decided mainly based on the *Restatement* and respected treatises. *See Mobil Oil Expl. & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08 (2000); *Franconia Assoc. v. United States*, 122 S. Ct. 1993, 2002 (2002). The Court's approach in tort claims against the United States is similar. *See Richards v. United States*, 369 U.S. 1, 6 (1962).

the basic features of trust law are so well known that the *Mitchell* framework, informed by trust law principles, offers stability and predictability. *See Amax*, 453 U.S. at 330; *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 716 (2002) (contours of the term "equitable relief" are so well known that courts rarely need to inquire further than the Restatement and respected treatises). Indeed, trust law principles will often limit the Government's liability to Indians. *See, e.g., Dann*, 470 U.S. at 48; *Mitchell II*, 463 U.S. at 237 n.11 (Powell, J., dissenting); *Mason*, 412 U.S. at 398.

This Court and the lower courts have taken into account the uniqueness of the federal/Indian relationship and have placed limits on the Government's potential liability, limits appropriate to the unique context of the federal trust. For example, *Nevada* recognized that the Department of the Interior cannot be held to the "fastidious standards of a private fiduciary" when Congress has specifically imposed conflicting duties on it. 463 U.S. at 128. Similarly, *Pawnee* recognized federal trusteeship over Indian mineral leases, but rejected liability for claims that would have required Interior officials to contravene the regulations and lease terms that formed the "contours" of the trust duties. 830 F.2d at 191-92.

Most importantly, in fashioning these federal rules, the courts will "look to the common law and other history for guidance . . . 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent" in enacting IMLA and the Indian Tucker Act. *See Burns v. Reed*, 500 U.S. 478, 493 (1991) (citation omitted); *see also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994). Here, Congress contemplated use of basic trust law standards when it enacted the Indian Tucker Act. *Mitchell II* honored that clear congressional intent, and the Court of Appeals did so as well.

D. The Department Violated Compensable Trust Duties by Shelving a Well-Supported Lease Adjustment for Peabody's Benefit, Misleading the Navajo Nation and Forcing It to Negotiate, and Rubber-Stamping Lease Amendments at Sub-Minimum Royalty Rates.

In this case, the Department exercised its control not to assist the Navajo Nation to become self-sufficient, but to benefit Peabody at the Navajos' expense. Pet. App. 3a. The Department violated its duty to adjust the royalty rate under the original lease, *see* 25 U.S.C. § 399, para. 6; Lease, art. VI, J.A. 194; its duty to supervise and limit negotiations to prevent unfairness and overreaching, *see* 25 C.F.R. § 211.2 (1985); and its duty to review and approve any proposed coal lease with care to promote IMLA's basic purpose and the Navajo Nation's best interests. *See* 25 U.S.C. § 396a; *Kerr-McGee*, 471 U.S. at 200. These breaches of fundamental trust duties are compensable under *Mitchell II*.

1. In addition to the governing statutes and regulations, *Mitchell II* recognized that "other fundamental document[s]" help define the contours of the Government's trust duties. *Mitchell II*, 463 U.S. at 225. When the Government approves a mineral lease pursuant to a federal statute and exercises reserved trust authority under that lease, the lease is a "fundamental document." *See Pawnee*, 830 F.2d at 192; 30 C.F.R. § 206.450(b). A faithful exercise of the right to adjust the royalty rate here, the most important financial term of the lease, lay well within the "contours" of both IMLA and 25 U.S.C. § 399. The Government's administration of that lease provision was a trust function. *See Supron*, 728 F.2d at 1567.

All federal studies found that a 20% royalty rate adjustment by the BIA Area Director in 1984 was fair and reasonable. J.A. 134, 153. But, at Peabody's *ex parte* behest, the Secretary signed instructions to Acting Commissioner Fritz drafted by Peabody's lawyers that jettisoned a well-supported royalty adjustment and effectively reverted the royalty rate to 37.5¢ per ton indefinitely. *See* J.A. 118 ("If it becomes inevitable that such a [royalty adjustment] determination must be made by the Department, then we can discuss it at that time."); C.A. App. A1670. The Secretary did this in violation of the duty of loyalty, "the most fundamental duty owed by the trustee to the beneficiaries." Austin W. Scott, *et al., The Law of Trusts* § 171, at 311 (4th ed. 1987); *Amax*, 453 U.S. at 329-30.

The loyalty of the Navajo Nation to the United States "has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return." *See Shoshone Tribe*, 299 U.S. at 486; Pres. Proc. No. 6847 (1995). Such fidelity was conspicuously lacking at the Interior Department, but was restored by the court below.

2. The Department chose to deceive the Navajo Nation, Pet. App. 11a-12a; J.A. 167-69, in violation of basic trust principles. "[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries." *Varity Corp.*, 516 U.S. at 506. The Department's false and cryptic communications reasonably led the Navajo leadership to conclude that the Department believed the 20% figure was vulnerable on the merits. *Cf. Earll v. Picken*, 113 F.2d 150, 158 (D.C. Cir. 1940) ("The trustee's duty of disclosure is not discharged by leaving the cestui to draw doubtful inferences, conclusions and suspicions . . .").

As Judge Baskir observed below, "[a] negotiator's weapon is knowledge. . . . Unaware that the Secretary had already promised their opponents he would not decide the dispute, the Navajo Nation, arguably already at a

competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody and the utilities. . . ." Pet. App. 51a-52a; *see* C.A. App. 1280. Hodel's instructions, drafted by Peabody, were a perfect instrument for the companies' "maximum delay" strategy. *See* J.A. 143, 169; C.A. App. A1648.

By contrast, applicable regulations allowed mineral leasing negotiations only when sought by the Indian mineral owner, and generally limited those negotiations to thirty days. 25 C.F.R. § 211.2 (1985). This regulation "is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources." Pet. App. 57a. The Department wilfully violated it. J.A. 174-75. Any doubts about its construction should be resolved in the Indians' favor. *See Blackfeet*, 471 U.S. at 766; *Supron*, 728 F.2d at 1567.

The Department knew that the Navajo Nation did not have the staying power of Peabody, the world's largest coal company, and Edison, one of the country's largest investor-owned utilities. *See* J.A. 137-38. These companies were paying virtually nothing for Navajo coal while negotiations dragged out. By contrast, the Navajo Nation was struggling to provide water, electricity, and paved roads for its citizens; "[t]he need for money was great, and it was growing daily." J.A. 355 (testimony of Judge Nelson). The Department knew that the Navajo Nation would get "beat up" in the years-long negotiations. *See* J.A. 185; C.A. App. A1280, A1643-44.

Such actions breach compensable trust duties. An Indian tribe may recover damages for breach of trust where federal officials mislead it about the value of its resources or withhold knowledge of that value to the tribe's detriment. *See Klamath*, 296 U.S. at 255. The Department's active collusion with Peabody also constitutes a compensable breach of trust. "[F]raud or gross negligence in the actual conduct of the United States as trustee, or in the conduct of its agents, will make the

Government liable for damages in breach of trust." *Coast Indian Cmty. v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1977), *cited in Mitchell II*, 463 U.S. at 226 n.31.

3. As Judge Schall's concurrence emphasized, a fundamental trust responsibility under IMLA, and one rooted in statutes dating back to the beginning of the Republic, is the duty to exercise the federal lease approval power in the Indians' best interest. *See* Pet. App. 26a-27a; *supra* pp. 20-21. The Secretary must, as trustee, "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *Mason*, 412 U.S. at 398 (citation omitted).

By contrast, once Secretary Hodel was assured the lease amendments were desired by Peabody, *see* J.A. 175, the merits of the deal from the Navajo Nation's perspective became "irrelevant." J.A. 176. Determining a proper royalty rate by the United States for its *own* coal is not "irrelevant." *See Peabody Coal Co.*, 93 IBLA 317 (1986) (adjusting royalty for federal coal to 17.08%). The lease amendments Hodel approved also abrogated the Department's right to adjust the royalty rate forever, but the United States has never relinquished that right for its own coal, J.A. 186, and the lease provided for such abrogation only "[i]n the event of termination of federal jurisdiction," J.A. 186, 194.[23] Such approval of these and many other damaging terms, *see supra* p. 11,[24] did not comply with fundamental requirements of a trustee's duty of care.

[23] Peabody had long been trying to abrogate this trust authority, *see Hearings Before the Senate Select Committee on Indian Affairs on S. 1894*, 97th Cong., 2d Sess. 108 (1982) (Peabody, through Farrand, seeks legislation to subject IMLA disputes to arbitration).

[24] The Government's suggestion that the Navajo Nation did not seek to invalidate the lease in the Court of Federal Claims because it liked some of the terms, Pet. Br. 32, 40, is baseless. At argument,

(Continued on following page)

The Secretary's exercise of his approval power was required to conform to the basic purpose of IMLA, to maximize tribal revenues, and that of the Navajo and Hopi Rehabilitation Act, to "further the purposes of existing treaties with the Navajo Indians" by "promoting a self-sustaining economy and self-reliant communities," 25 U.S.C. § 631. The Department's manuals "prescribe economic appraisals of the transactions between Indians and private companies such as Peabody." Pet. App. 58a. Here, however, "[i]t is undisputed that . . . DOI failed to perform any economic analysis regarding the lease amendments." Pet. App. 27a (Schall, J.). This unconsidered approval violated the trustee's duty of care. *See Mason*, 412 U.S. at 398; *Cheyenne-Arapaho*, 966 F.2d at 589.[25]

SRP estimated the Navajos' loss in royalties for the coal used at just one of the two power plants at $347 million, and Edison estimated the Navajos' loss of back royalties and taxes alone at $89 million. J.A. 187, Pet. App. 44a. A few scholarships and increased water payments cannot make up for that.[26]

Navajo counsel simply recognized that the Court of Federal Claims had no authority to invalidate an approved lease, and characterized the few beneficial terms of the lease amendments as providing "chump change" to the Navajo. C.A. App. A3088, A3123-A3127.

[25] The instructions to Fritz drafted by Peabody's lawyers and signed by Hodel advert to the threat of litigation. Pet. Br. 8. Though even a *genuine* "threat of litigation may be intimidating . . . careful analysis of relevant factors takes precedence over avoiding a lawsuit." *Cheyenne-Arapaho Tribes*, 966 F.2d at 590. Regardless, the Navajo Nation was prepared to defend the royalty adjustment in litigation, as it had informed its trustee. *See* C.A. App. A751.

[26] The Government argues that the royalty rate for coal jointly owned by the Navajo and Hopi was also raised from 6.67% to 12½%. *See* Pet. Br. at 4 n.3, 9. However, that limited rate increase only damaged the Navajo further, and damaged the Hopi as well. The Navajo had already raised royalty rates of other inequitable coal leases to 12½%

(Continued on following page)

II. OTHER VARIANTS OF THE GOVERNMENT'S UNSUCCESSFUL ARGUMENTS IN *MITCHELL II* SHOULD BE REJECTED.

The Government's arguments here generally repackage its unsuccessful arguments in *Mitchell II*. As discussed above, *Mitchell II* rejected its views that an Indian plaintiff may only prevail if it shows a violation of a specific statute or regulation that in itself clearly mandates compensation for its violation, and that trust law standards are too imprecise to apply to the Department. And, as explained below, real or feigned respect for tribal self-determination does not excuse violation of basic trust duties, federal law does not limit Indians damaged by breaches of trust to prospective relief, and the Government's casual invocation of private right of action cases cannot negate jurisdiction conferred by the Tucker Act. These arguments also failed to convince the Court in *Mitchell II* and should again be rejected. *See Babbitt v. Youpee*, 519 U.S. 234, 245 (1997).

A. The Ideal of Tribal Self-Determination Does Not Dilute Trust Duties.

In the space of 20 pages, the Government's brief transforms the modern federal policy favoring tribal self-determination from a supposed "focus" of IMLA to its "central aim." *See* Pet. Br. 18, 19, 20, 38. *Contra Kerr-McGee*,

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despite the lack of adjustment provisions in those leases. J.A. 175-76. Here, as Peabody and its customers recognized, if the royalty rate here were adjusted to 20%, the royalty rate for the jointly owned coal would have risen to the same figure. *See* J.A. 157. The Government's assertion that the Navajo Nation "has made no . . . claim" that a reasonable trustee could not have believed the lease amendments were in the tribe's "best interest," Pet. Br. 33, is nonsense. That is what this case is all about. First Am. Compl. ¶¶ 17, 21-24; C.A. App. 36, 40-41.

471 U.S. at 200. It repeatedly offers, never with any citation to authority, that the historic requirement of federal approval of Indian land transactions is merely to give "backstop protection" to the tribes, whatever that might be. *E.g.*, Pet. Br. 18, 43, 49. *Contra Tuscarora*, 362 U.S. at 118-19; *Sunderland*, 266 U.S. at 234. The Government unsuccessfully asserted in *Mitchell II* that the federal policy favoring Indian self-determination compromises trust duties. *See* Brief for the United States, No. 81-1748, at 35. That argument has gained no force in the intervening 20 years.

In fact, IMLA's only nod to tribal self-determination was to prevent the Secretary from leasing tribal minerals over the Indians' objections. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L. J. 541, 558-61 (1994). IMLA and its implementing regulations "leave no significant authority in the hands of the Indian tribes." Pet. App. 10a; Royster, at 565. But even if IMLA allowed tribes to exercise significant management authority, the Government presents a false dichotomy.

President Nixon, who forged the Indian self-determination policy, found vigorous enforcement of the trust duty and respect for tribal self-determination to be complementary. President Nixon sought to ensure Federal support for tribal self-determination by emphasizing, not limiting, the trust duty. Focusing on the Indians' "natural resource rights," President Nixon emphasized that "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573.

President Reagan continued that policy. "In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we

hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished with the highest standards." President's Statement on Indian Policy, 1983 Pub. Papers 96. President George H. W. Bush reaffirmed that the federal trust duty over natural resources was "an obligation of the highest responsibility and trust," to be judged "by the most exacting fiduciary standards." Statement on Signing the Department of the Interior and Related Appropriations Act, 1991, 26 Weekly Comp. Pres. Doc. 1768, 1769 (1990).

In both the Indian Self Determination and Education Assistance Act and later amendments to that Act promoting tribal self-governance, Congress provided that greater tribal authority shall not compromise Federal trusteeship. *See* 25 U.S.C. §§ 450n(2), 458ff(b). Congress embraced this principle specifically in the Indian mineral context. Congress enacted IMDA in 1982 "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources." S. Rep. No. 97-472, *supra*, at 2. But, even under IMDA, if the Secretary exercises his approval authority "recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability." H.R. Rep. No. 97-746, *supra*, at 7-8; *accord* S. Rep. No. 97-472, *supra*, at 4-5.

In this case, the Navajo Nation consistently stated its position to the Department: it requested the royalty to be adjusted as provided by the lease and it sought a decision on Peabody's appeal of the adjustment decision. *See, e.g.*, J.A. 12, 119-21, 139-40, 161, 165; C.A. App. A468. Had the Department truly respected Navajo decision-making, it would have decided the appeal on the merits, not forced the Navajo Nation to negotiate at a decided disadvantage.

The Department did not advance the policy of respect for tribal self-government when it colluded with Peabody. Honest consultation with, not deception of, Indian tribes is

the cornerstone of the modern federal-tribal relationship. *See, e.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 6, 2000). "[W]hile the trust responsibility should support self-determination, that goal is illusory if it results from a compromised process or undue federal manipulation . . . ." Mary C. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1558. Indeed, as the Department recognizes, "maximiz[ing] the economic return on Indian mineral development [helps] to achieve greater Indian self-determination." 42 Fed. Reg. 18,083 (Apr. 5, 1977). Minimizing that return, as here, surely undermines tribal self-determination.

B. The Navajo Nation Had No Effective APA Remedy Here, and *Mitchell II* Rejected the Government's Argument That Such Remedies Preclude Monetary Relief.

The Government urges that the Navajo Nation's sole recourse is an action for equitable relief under the Administrative Procedure Act. *See* Pet. Br. at 36-37. *Mitchell II* rejected this argument, because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227. That is especially true here, where, unlike timber, the coal resource is non-renewable and the Government concealed from the Navajo Nation for years its subversion of Navajo interests. Even Government counsel was unaware of the depth of the Government's misconduct until well into discovery in this case. *See* C.A. App. A2093-94 nn.5-6; A3149-50.

The Navajo Nation's claim is not a quibble over procedural niceties, as the Government contends. *Ex parte* communications that do no harm to Indians would indeed

be a mere technical wrong. Here, however, the *ex parte* communication led the Secretary to suppress a finished decision favoring the Navajo, to hide his actions and conceal valuable information from the Navajo, and, ultimately, to agree to approve damaging lease amendments with no substantive review. Even if Peabody's advances had not been made surreptitiously, those actions would still mandate compensation. The Secretary "cannot escape his role as trustee by donning the mantle of administrator." *Supron*, 728 F.2d at 1567.[27]

Surely, claims not seeking injunctive relief rely on allegations of past wrongdoing. But that general truism does not mean that the Navajo Nation's claim here is simply second-guessing. *Cf.* Pet. Br. 43. *Nevada* is instructive on this point. *Nevada* rejected a tribe's claim that *did* rely in part on hindsight, but distinguished such hindsight from the type of facts present here:

[27] Even where parties have purely procedural claims and the agency has complied with its own procedural rules, agency action may still be challenged "in order to afford the aggrieved individuals due process" or if there is "a totally unjustified departure from well-settled agency procedures." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 542 (1978). "It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. . . . [D]ue process forbids it." *Camero v. United States*, 375 F.2d 777, 781 (Ct. Cl. 1967) (*en banc*). Moreover, Solicitor Richardson had previously warned Secretary Hodel not to meet *ex parte* with Peabody, J.A. 148-49, and after Hodel ignored that advice, the Associate Solicitor for Indian Affairs warned that the Secretary had denied the Navajo due process by adopting Peabody's desired course of action, J.A. 122-23. The Department's Office of Hearings and Appeals, the Secretary's "authorized representative," 43 C.F.R. § 4.1, had forbidden *ex parte* communications with Interior decision makers, "whether or not they are prohibited by statute or regulation." *Pueblo of Laguna v. Assistant Secretary for Indian Affairs*, 12 IBIA 80, 97, 90 Interior Dec. 521, 531 (1983).

> there is nothing in the record in this case to indicate that any official outside of the BIA attempted to influence the BIA's decisions in a manner inconsistent with these [trust] obligations. The record suggests that the BIA alone may have made the decision . . . for reasons which hindsight may render questionable, but which did not involve other interests represented by the Government.

Nevada, 463 U.S. at 135 n.15. Here, in contrast, the BIA did everything correctly before being stopped in its tracks by the Secretary acting on behalf of Peabody.

Determining the Government's liability in this case requires no hindsight. The Department knew when it jettisoned the royalty rate adjustment and forced more negotiations that the Navajo would suffer. *E.g.*, C.A. App. A1641-44. The Department knew that the Navajo coal should have commanded a 20% royalty when it approved the sub-12½% deal. J.A. 14-88. Hodel knew that his actions were improper. *See* Pet. App. 31a-32a; J.A. 148-49.

C. The Implied Right of Action Doctrine Does Not Apply Here.

The Government drops oblique references to cases that concern implied rights of action. Pet. Br. 24. "However, the legion of cases in which tribes have sued to enforce Indian rights protected by treaties, statutes and executive orders have proceeded without undertaking that analysis." *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002), *citing Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). In the Tucker Act, Congress expressly waived sovereign immunity concerning actions for money damages. *Mitchell II*, 463 U.S. at 216, 218-19. The question of implication is therefore moot. *See Cannon*, 441 U.S. at 694.

This issue was briefed by the Government and discussed at argument in *Mitchell II*, *see* Brief for the United States, No. 81-1748, at 27-28 & n.23; Tr. of Oral Arg. at 32-40 (Mar. 1, 1983), yet it merited not a word in the majority opinion and only a brief statement in the dissent, *see* 463 U.S. at 232 (Powell, J., dissenting). *Mitchell II* decided that the Tucker Act confers jurisdiction over tribal claims for breach of trust. If jurisdiction were denied here based on lack of an implied right of action, *Mitchell II* would be effectively overruled. Such a result would be "demonstrably inequitable" and should be avoided. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104 (1991); *see also Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 292 (1993). Moreover, the Government did not seek such a drastic ruling in either its Petition or its brief, and its brief accepts the *Mitchell II* framework. Therefore, this Court has no reason to reconsider *Mitchell II*, through the guise of the implied right of action doctrine or otherwise. *See, e.g., Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX

NAVAJO AND HOPI REHABILITATION ACT OF 1950

25 U.S.C. §§ 631-40

§ 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

* * *

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

* * *

§ 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

* * *

§ 635. Disposition of Lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with

the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

* * *

§ 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

* * *

25 U.S.C. § 399

§ 399 Leases of unallotted mineral lands withdrawn from entry under mining laws

[para. 1] *Authority of Secretary of Interior to lease.* The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him and under such terms and conditions as he may prescribe, not inconsistent with the terms of this section, to lease to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States or of any State or Territory thereof, any part of the unallotted lands within any Indian reservation within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming withdrawn prior to June 30, 1919, from entry under the mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, and nonmetalliferous minerals, not including oil and gas, which leases shall be irrevocable, except as herein provided, but which may be declared null and void upon breach of any of their terms.

* * *

[para. 6] *Term of lease; renewal.* Leases under this section shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years, upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods.

* * *

[para. 15] *Examination of books and account of lessees.* The Secretary of the Interior is authorized to examine the books and accounts of lessees, and to require them to submit statements, representations, or reports, including information as to cost of mining, all of which statements, representations, or reports so required shall be upon oath, unless otherwise specified, and in such form and upon such blanks as the Secretary of the Interior may require; and any person making any false statement, representation, or report under oath or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28 shall be subject to punishment as for perjury.

[para. 16] *Disposition of rentals and royalties.* All moneys received from royalties and rentals under the provisions of this section shall be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the reservation where the leased land is located, which moneys shall be at all times subject to appropriation by Congress for their benefit, unless otherwise provided by treaty or agreement ratified by Congress: *Provided,* That such moneys shall be subject to the laws authorizing the pro rata distribution of Indian tribal funds.

[para. 17] *Protection of interests of Indians.* The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect: *Provided,* That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they

may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

* * *

TRIBAL SELF-GOVERNANCE AMENDMENTS

25 U.S.C. § 458

§ 458ff Disclaimers

* * *

(b) Federal trust responsibilities

Nothing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

* * *

TREATY WITH THE NAVAJO INDIANS.
June 1, 1868

* * *

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be

provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provision of this article to continue for not less than ten years.

* * *

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No. 01-1375

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Federal Circuit held that the United States may be liable to the Navajo Nation (Tribe) for up to $600 million in damages for breach of fiduciary duty, without finding that the Secretary violated any specific statutory or regulatory duty. In this Court, the Tribe likewise fails to identify the violation of any specific statutory or regulatory duty, much less one that can fairly be read to mandate monetary compensation in the event of a violation. The Tribe suggests that the United States may be held liable in damages based simply on the breach of a generalized trust relationship. But that expansive alternative theory for affirming the judgment below is contradicted by the terms of the Tucker Act, this Court's precedents, and bedrock sovereign immunity principles.

A. The Existence Of A General Trust Relationship Does Not Alter The Scope Of The Tucker Act's Limited Waiver Of Sovereign Immunity

1. The Tribe refuses to recognize the limits on the waiver of sovereign immunity effected by the Tucker Act. The Tucker Act itself does "not create any substantive right enforceable against the United States for money damages."

United States v. *Mitchell*, 463 U.S. 206, 216 (1983) (*Mitchell II*); see U.S. Br. 21-24. Rather, in order to state a cause of action for damages under the Tucker Act, a plaintiff suing other than for breach of contract must point to an "Act of Congress" or "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. As discussed in the government's opening brief (Br. 26-40) and in Point B, *infra*, the Tribe has not identified the violation of any such statute or regulation.

2. Instead of attempting to ground its claims on the violation of an Act of Congress or implementing regulation, the Tribe argues (Br. 16) that "*Mitchell II* held that the Tucker Act waived the Government's immunity for claims of breach of trust concerning federal management of Indian resources." See Resp. Br. 16-20. Thus, according to the Tribe (Br. 19), "once an active trust relationship is found to arise from [a] statutory scheme, there is no need to go back and look for a separate 'money-mandating' statute or regulation to state a claim cognizable under the Tucker Act." See also Br. for Amicus Nat'l Congress of American Indians (NCAI Br.) 6, 12-14. But neither *Mitchell II* nor this Court's other Tucker Act decisions support such an expansive interpretation of the Tucker Act.

In *Mitchell II*, the Court did not simply point to "an active trust relationship" (Resp. Br. 19) and hold that damages were available under the Tucker Act for generalized breaches of such a relationship as a court may conceive of it. To the contrary, the Court examined in detail the "various Acts of Congress and executive department regulations" governing Indian timber sales and looked to "whether *they* [*i.e.*, the statutes and regulations] can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219

(emphasis added); see *id.* at 219-223. So too, the Indian plaintiffs in *Mitchell II* based their claims on alleged violations of specific statutory and regulatory provisions. See *id.* at 210; U.S. Br. 27-28. In stark contrast, while "[a]lleging breaches of general fiduciary duties, the Navajo have failed to link any breach to a specific money-mandating statutory or regulatory provision." Pet. App. 66a (Court of Federal Claims); *id.* at 26a (Judge Schall); U.S. Br. 29-38. Thus, to allow a damages action in this case under the Tucker Act would require a significant departure from *Mitchell II*.

The Tribe suggests (Br. 19, 20) that the existence of federal control over an Indian resource is alone sufficient to support a damages claim against the United States for mismanagement of that resource. In *Mitchell II*, however, the Court did not look to the existence of federal control in the abstract. Instead, the Court looked to whether the particular statutes and regulations on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added). Thus, instead of adopting the sort of generalized control test advanced by the Tribe here, the Court required the Indians to show the violation of a specific statutory or regulatory duty in exercising control. U.S. Br. 40-46.[1]

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[1] The Tribe argues (Br. 15) that "[t]here is no principled distinction between the statutory scheme governing Indian coal at issue here and that governing Indian timber in *Mitchell II*." See Br. 20. But as the Court of Federal Claims concluded, the regulatory scheme in this case "falls far short of [creating] the detailed fiduciary responsibilities of *Mitchell II*." Pet. App. 68a; see U.S. Br. 41-42. The Tribe asserts (Br. 25-27) that the Department has issued "comprehensive regulations" to implement the IMLA. But none of the regulations cited by the Tribe imposes any specific requirements with respect to the Secretary's decision to approve a lease or lease amendments, with the exception of ensuring that a lease contains the minimum federal royalty rate. See U.S. Br. 3. By contrast, the statutes and regulations governing Indian timber sales established numerous specific duties with respect to the particular aspects

3. The Tribe argues (Br. 17) that the Indian Tucker Act "provides further support for *Mitchell II*'s conclusion that Congress intended a damage remedy for breaches of trust regarding Indian resource management." But in *Mitchell II* itself the Court reiterated that the Indian Tucker Act entitles Indian or tribal claimants to the "same" rights and remedies in suits against the United States that non-Indians enjoy under the Tucker Act, and not a special right to damages against the United States based on the existence of a generalized fiduciary relationship with Indian Tribes or resources. *Mitchell II*, 463 U.S. at 212 n.8; see *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*). In addition, as this Court has explained, the legislative history of the Indian Tucker Act confirms that Congress did not intend that Act "to be a waiver of sovereign immunity for any alleged breach of trust accruing *after* August 13, 1946" that is not based on a specific statutory or regulatory duty. *Id.* at 540 n.2 (emphasis added).

The Tribe claims (Br. 17) that its interpretation of the Indian Tucker Act is consistent with "this Court's decisions in special jurisdictional act cases that held the Government liable for breach of fiduciary duties." But the decisions on which it relies (see Br. 18 n.9) based the availability of damages *not* on the breach of a generalized trust relationship, but instead on the violation of specific statutory or treaty provisions. See *Seminole Nation* v. *United States*, 316 U.S. 286, 295-297 (1942) (violation of specific treaty obligation to disburse payments to individual tribal members); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938) (violation of specific treaty right to "absolute and

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of the federal management scheme at issue in *Mitchell II*. See 463 U.S. at 219-222. The IMLA regulations thus further underscore the disparity between this case and *Mitchell II* with respect to both the degree of federal control over the Indian resources in general and the particular action (lease approval) on which the Tribe focuses.

undisturbed use and occupation" of reservation lands); *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935) (violation of specific treaty provision conferring "fee simple title" to lands).[2]

4. The Tribe's argument that the Tucker Act confers jurisdiction over claims for breach of trust based on generalized conceptions of fiduciary duties is further contradicted by this Court's Tucker Act decisions stressing that the "grant of a right of action [for money damages] must be made with *specificity*." *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (emphasis added); accord *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982) (Under the Tucker Act, "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not *specifically* authorize awards of money damages.") (emphasis added). The Tribe's theory would vitiate that "specificity" requirement.

This Court shows similar restraint in determining whether an Act of Congress creates a federal right that is enforceable under 42 U.S.C. 1983. See *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2274-2275 (2002); U.S. Br. 24. In *Gonzaga*, this Court rejected "a relatively loose standard for finding rights enforceable by § 1983." 122 S. Ct. at 2274. Here, the Court should reject the even looser standard urged by the Tribe and its amici for determining when a money damages claim may be brought under the Tucker Act.

NCAI suggests (Br. 25-28) that this line of authority is inapposite. But here, as in the Section 1983 context, the question is whether rights allegedly conferred by a specific federal statute or implementing regulation are enforceable in an action brought under the general terms of a statute that allows for the recovery of damages for the violation of

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[2] In *Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 254-255 (1935), the damages claim at issue did not fall within the terms of the special jurisdictional act, and therefore was dismissed.

federal rights. In both situations, it is not enough to point simply to a statute or regulation that a plaintiff seeks to enforce. Rather, the plaintiff must point to the violation of a statute that "confer[s] entitlements sufficiently specific and definite to qualify as enforceable rights," 122 S. Ct. at 2273, in the form of "specific monetary entitlements," *id.* at 2274. See *Testan*, 424 U.S. at 400. Indeed, in a critical respect, the inquiry under the Tucker Act is even more stringent than that under Section 1983: under the Tucker Act, the plaintiff must not only point to a statute or regulation that creates enforceable rights, but also establish that the statute or regulation mandates the payment of compensation for a violation. *Mitchell II*, 463 U.S. at 217-218.

B. The Tribe Has Not Identified The Violation Of Any Specific Statutory Or Regulatory Duty Mandating Compensation For A Violation

It is not until page 39 of its brief that the Tribe attempts to link the alleged breach of trust to the violation of any concrete duties. None of the purported duties identified by the Tribe supports its damages claim under the Tucker Act.

1. The Tribe argues (Br. 39) that "[t]he Department violated its duty to adjust the royalty rate under the original lease." Article VI of the lease made its royalty provisions "subject to" a "reasonable adjustment" by the Secretary upon the 20-year anniversary of the lease. Pet. App. 67a. As the Court of Federal Claims concluded (and the Tribe does not challenge in this Court), that provision was not contractually binding on the Secretary. *Id.* at 70a. Because Article VI of the lease itself merely authorized but did not mandate any royalty adjustment and did not contractually bind the Secretary, any claim for damages based on a failure to adjust the royalty (or to adjust it by a certain amount) must fail. Furthermore, a claim that the Secretary did not act in compliance with the terms of a *lease* is not a claim

based on an Act of Congress or implementing regulation, as required by the Tucker Act. See U.S. Br. 33.[3]

In addition, even if the lease had obligated the Secretary to adjust the royalty rate and that obligation were enforceable in an action under the Tucker Act, the lease would not have required the Secretary to adjust the rate in a manner that *maximized* profits for the Tribe, as the Tribe apparently maintains. The lease made the original royalty rate subject to "reasonable adjustment" (Pet. App. 67a), and determining what would be "reasonable" under a lease that protected both parties would properly take into account the interests of both parties, not only those of the Tribe. That conclusion is confirmed by the fact that Article VI of the lease provided for renegotiation and if necessary arbitration—standard contract procedures that allow for the play of both parties' interests—to resolve differences between the parties concerning a possible adjustment to the royalty rate if the land was no longer subject to federal jurisdiction at the time an adjustment could be made. J.A. 194.

The Tribe also relies (Br. 39-40) on paragraph 6 of 25 U.S.C. 399 in arguing that the Secretary breached a duty in connection with the royalty-adjustment clause of the original lease. That reliance is misplaced. Section 399, which was enacted in 1919, is not part of the Indian Mineral Leasing

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[3] The Tribe argues that the lease is "a 'fundamental document'" that "define[s] the contours of the Government's trust duties." Resp. Br. 39 (citing *Pawnee* v. *United States*, 830 F.2d 187 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988)). In *Pawnee* and *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (1984), on reh'g, 782 F.2d 855 (en banc), supplemented, 793 F.2d 1171 (10th Cir.), cert. denied, 479 U.S. 970 (1986), on which the Tribe also relies (Br. 39), the relevant duties of the Secretary (to calculate and recover royalties) were imposed by a statute and regulations governing oil and gas leases, not the leases themselves. Reference to the leases was required only to ascertain the measure of the royalties to be collected for the Indians. The Tribe here, by contrast, relies on the lease to supply the duty that, it claims, is enforceable under the Tucker Act.

Act (IMLA), and thus does not govern the lease at issue in this case. In fact, because Section 399 governed leases of lands *by the Secretary*, rather than by a Tribe, it could not apply to the Navajo lease here. See U.S. Br. 44 n.16. Nor does the general discussion of lease renewals in paragraph 6 of Section 399 specify any duty with respect to the adjustment of royalty rates pursuant to a clause in an existing lease or the handling of administrative appeals concerning such an adjustment, and it in any event provides only for "reasonable" terms upon renewal, not a maximum return to the Tribe. 25 U.S.C. 399 para. 6.

Although the Tribe claims (Br. 39) that the Secretary breached a duty in failing to "adjust the royalty rate under the original lease," the Tribe does not seriously attempt to defend the ground on which the court of appeals relied in finding a breach of fiduciary duty that is enforceable under the Tucker Act, *i.e.*, the Secretary's actions in 1985 with respect to the administrative appeal. See Pet. App. 11a-12a. As explained in the government's opening brief (Br. 30-31), the Secretary's responsibilities with respect to administrative appeals are governed by the Department's general procedural rules and the Administrative Procedure Act (APA). The court of appeals did not identify a violation of any procedural rule or provision of the APA, and even if it had, procedures governing administrative appeals are not fairly interpreted as mandating compensation for any alleged injury. See U.S. Br. 30-32.[4]

[4] In a footnote, the Tribe asserts (Br. 48 n.27) for the first time in this case that the government violated "due process" by allegedly departing from agency procedures. But the Secretary did not depart from any established agency procedure. U.S. Br. 31-32. *Pueblo of Laguna* v. *Assistant Secretary for Indian Affairs*, 12 I.B.I.A. 80 (1983), is not to the contrary. In *Pueblo of Laguna*, which did not involve a claim for damages, the Interior Board of Indian Appeals *rejected* a claim that an administrative decision should be set aside on the ground that it was tainted by improper ex parte communications. 12 I.B.I.A. at 97. In any event, the Tucker Act does not provide a damages remedy for violation of the Due Process Clause. See U.S. Br. 32.

2. The Tribe argues (Br. 39) that "[t]he Department violated * * * its duty to supervise and limit negotiations to prevent unfairness and overreaching," citing 25 C.F.R. 211.2 (1985). See Resp. Br. 40-42. But as Judge Schall and the Court of Federal Claims recognized, the text of that regulation lends no support to the Tribe's position. Pet. App. 26a-27a n.5, 57a-58a. In pertinent part, the regulation allowed the negotiation of leases as an alternative to competitive bidding, "reserve[d]" to the Secretary the right "to direct that negotiated leases be rejected," and provided that negotiated leases "shall be filed" with the Indian agency within 30 days after negotiations were authorized, unless that time was extended. 25 C.F.R. 211.2 (1985). It said nothing about supervising negotiations. Moreover, the regulation did not refer to royalty adjustments under (or amendments to) *existing* leases. It instead was addressed to the negotiation of *new* leases, as an alternative to competitive bidding for such leases. But even if Section 211.2 imposed procedural parameters that were somehow violated by the Secretary, nothing in that provision can fairly be interpreted as mandating monetary compensation. See U.S. Br. 38-39 n.14.[5]

3. The Tribe argues (Br. 39) that "[t]he Department violated * * * its duty to review and approve any proposed coal lease with care to promote IMLA's basic purpose and the Navajo Nation's best interests," citing 25 U.S.C. 396a

[5] Indeed, under the Court of Claims' seminal decision in *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002 (1967), on which this Court has relied in its Tucker Act cases ever since (including in *Mitchell II*, see 463 U.S. at 217, 223 n.23), the Tribe's arguments (Br. 40-42) regarding the actions of the Interior Department that the Tribe alleges might have affected negotiations between the Tribe and Peabody sound in tort, and therefore are beyond the scope of the Tucker Act for that additional reason. See 372 F.2d at 1009-1011.

and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). See Resp. Br. 42-43. The breach of a generalized statutory directive to act in the interests of the Indians would not support a damages claim under the Tucker Act. Indeed, in *Mitchell I*, this Court held that the Indian plaintiffs failed to state a claim for damages that was enforceable under the Tucker Act even though the plaintiffs alleged a breach of trust under a statute that explicitly obligated the United States to hold allotted lands "'in trust for the sole use and benefit of [Indian allottees].'" 445 U.S. at 541 (quoting 25 U.S.C. 348). In any event, the IMLA does not specify the sort of duty urged by the Tribe. See U.S. Br. 37-39.

Section 396a of the IMLA states that a Tribe "may, with the approval of the Secretary of the Interior," lease unallotted lands for mining purposes. 25 U.S.C. 396a. Nothing in that provision specifically obligates the Secretary to determine, prior to approving a lease, whether a lease agreed to by a Tribe and a private party is in the Tribe's "best interests," much less that it maximizes the return to the Tribe. Furthermore, the IMLA's objective of promoting Indian self-determination would be directly undercut by requiring the Secretary to look behind every mineral lease negotiated by a Tribe and a private party and determine whether, in the government's view, the agreement was in fact in the Tribe's best interests. See U.S. Br. 41-42 & 44 n.16. The Department underscored that objective when it revised the IMLA regulations in 1996, and explained that "consistent with the United States' policy on self-determination, the Department has attempted to provide the Tribes as much freedom as possible to make their own determination on issues affecting the development of their minerals." 56 Fed. Reg. 58,733, 58,735 (1991).

Section 396b of the IMLA addresses the public auction of oil and gas leases by the Department, and reserves to the

Secretary the right to reject the highest competitive bid for an oil and gas lease when the Secretary "shall determine that it is unwise in the interest of the Indians to accept the highest bid." 25 U.S.C 396b. The juxtaposition of Section 396a and Section 396b underscores that Congress did not specifically obligate the Secretary to conduct an "interest of the Indians" analysis in determining whether to *approve* a *coal* lease that was negotiated and agreed to in the first instance by a Tribe itself. That is especially true where, as here, the royalty rate and other provisions of the lease satisfied all applicable regulatory requirements.

The Tribe's reliance on *Kerr-McGee* is also misplaced. In that case, the Court held that the Navajo Tribe was authorized to impose certain business taxes without first obtaining the approval of the Secretary. 471 U.S. at 201. In dictum, the Court stated that a "basic purpose" of the IMLA is "to maximize tribal revenues from reservation lands," referring to a statement in a committee report accompanying the passage of that 1938 Act. *Id.* at 200 (citing S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937)). But in its subsequent decision in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 179 (1989), this Court recognized that the statement in the same committee report referred to in *Kerr-McGee*—which "happened to include the phrase 'the greatest return from their property'"—cannot be given "talismanic effect." The *Cotton Petroleum* Court therefore rejected the argument "that the 1938 Act embodies a broad congressional policy of maximizing revenues for Indian tribes." *Id.* at 179; see U.S. Br. 42.[6]

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[6] Citing two decisions of the Interior Board of Land Appeals, the Tribe claims (Br. 31-32) that "the Department itself * * * has ruled that it is duty bound to maximize tribal revenues under IMLA." But in *General Crude Oil Co.*, 18 I.B.L.A. 326, 329 (1975), the Board determined that the Secretary properly rejected an offer for an oil and gas lease on trust lands under the Act of August 21, 1916; the IMLA was not involved at all. And in *Robert L. Bayless*, 149 I.B.L.A. 140, 150 (1999), the Board

As this Court explained in *Cotton Petroleum*, "[r]ead in the broadest terms possible, the relevant paragraph [in the legislative history] suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" 490 U.S. at 179 (citing S. Rep. No. 985, *supra*, at 2; H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)) (latter brackets added by this Court). That policy objective was met here inasmuch as the 12 1/2 percent royalty rate approved by the Secretary under the 1987 lease amendments equals the minimum rate set by Congress for coal mined on federal lands. See 30 U.S.C. 207(a); U.S. Br. 5 n.4, 34.[7]

The Tribe refers (Br. 30) to a provision of the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2103(b), which governs the Secretary's approval of *agreements* for the *development* of Indian mineral resources subject to that Act. The lease in this case is not subject to the IMDA. Moreover, Section 2103(b) of the IMDA only underscores that Congress knows how to direct the Secretary to consider specific factors in reviewing an agreement, and that it did not do so in Section 396a of the IMLA. Compare 25 U.S.C. 396a (authorizing Tribes to enter into mineral leases "with the approval of the Secretary of the Interior") with 25 U.S.C.

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merely noted that it was following a court of appeals' holding that where the Department "is faced with two reasonable interpretations of a regulation, it must choose the one that better promotes the Tribe's interests."

[7] In response to the statement by Amicus Peabody Coal Co. (Peabody Br. 26) that "a royalty rate of 12.5% * * * was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996," the Tribe points to a single federal coal lease with a royalty rate of 17.08 percent. See Resp. Br. 32 n.18 (citing *Peabody Coal Co.*, 93 I.B.L.A. 317 (1986)); *id.* at 11 (same). But the lease in *Peabody Coal* was "part of an experimental leasing policy tried by the Department for a short time [in which] bidders were permitted to bid for a higher royalty rate instead of submitting so large a cash bonus." 93 I.B.L.A. at 320.

2103(b) ("In approving or disapproving a Minerals Agreement, the Secretary shall determine if it is in the best interest of the Indian tribe or of any individual Indian who may be party to such agreement and shall consider, among other things, the potential economic return to the tribe; the potential environmental, social, and cultural effects on the tribe; and provisions for resolving disputes that may arise between the parties to the agreement."). There is good reason for Congress and the Secretary to distinguish between the two statutes. The IMLA governs leases, which can be expected to have more standardized terms and can be measured against criteria of general applicability, such as a minimum royalty rate tied to the minimum rate for federal leases, while the IMDA authorizes a wide variety of joint ventures and other arrangements for which a more particularized evaluation is appropriate.[8]

The Tribe points (Br. 26, 31) to language in regulations promulgated in 1996, see 25 C.F.R. 211 (2001), more than a

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[8] The Secretary's regulations governing the approval of mineral agreements subject to the IMDA similarly specify detailed procedures not set forth in the IMLA or the IMLA's implementing regulations. See 25 C.F.R. 225.22. For example, the regulations direct the Secretary to issue "written findings" including an "environmental study" and "economic assessment" of a proposed minerals agreement, 25 C.F.R. 225.22(b)(1), and state that "[a] minerals agreement shall be approved if, at the Secretary's discretion, it is determined that * * * [t]he minerals agreement is in the best interest of the Indian mineral owner," 25 C.F.R. 225.22(c)(1); see 25 C.F.R. 225.22(d) (specifying factors to take into account on "[t]he question of 'best interest'"). Notably, with respect to the "economic assessment," the IMDA regulations further specify that the Secretary "shall address," *inter alia*, "[w]hether the production royalties or other form of return on mineral resources is *adequate*." 25 C.F.R. 225.23(b) (emphasis added). Thus, the regulations do not require the Secretary to ensure that the royalty rate or other form of return *maximizes* profits to the Tribe. *A fortiori* that claim must be rejected here, where there is no statute or regulation that required the Secretary to undertake any economic analysis of an IMLA lease beyond assuring that the royalty rate satisfied the minimum specified by the Secretary's regulations.

decade *after* the events at issue here. As explained in the government's opening brief (Br. 37-38), even if the current regulations were applicable here, they would not support the Tribe's argument that the IMLA creates a free-floating "best interest" standard, much less a requirement, enforceable in a damages action under the Tucker Act, that the Secretary disapprove a lease unless he finds it would provide the *maximum* return to the Tribe. The regulations in fact refute that notion. They require only that a royalty rate be at least equal to 12 1/2 percent or, if less than 12 1/2 percent, that the Secretary determine that it nonetheless is in the best interest of the Indians, 25 C.F.R. 211.43(b) (see U.S. Br. 45-46), which the Secretary has construed to mean that it provides "adequate" consideration for the Tribe. 61 Fed. Reg. 35,634, 35,646 (1996).[9]

4. The Tribe suggests (Br. 43) that the Secretary violated an asserted duty to perform an independent economic analysis before approving the lease amendments in 1987, referring to internal agency manuals. See Pet. App. 24a, 58a. But the internal manual provisions relied upon by the Tribe (see Resp. C.A. Br. 55) do not suggest any such duty. One provision (54 BIAM 604.05) applies only to new *oil and gas*

[9] See also 61 Fed. Reg. at 35,645 (minimum royalty rate "may be raised upon agreement of the parties to a lease" or "may be reduced upon agreement of the parties *and the findings of the Department that a lower rate is in the best interest of the Indian mineral owner*") (emphasis added); *id.* at 35,646 (the determination whether to approve a lease with "a lower royalty rate" than the minimum rate specified in the regulations "will require a higher level of analysis to assure that the tribe is receiving adequate consideration"; "Tribes and industry are required to justify proposed *lower* royalty rates for leases on a case-by-case basis") (emphasis added). Accordingly, even if the adjusted 12 1/2 percent royalty rate included in the lease amendments approved by the Secretary in 1987 were subject to the 1996 regulations, that rate would not trigger any duty on the part of the Secretary to conduct a particularized best interest determination because, even today, the royalty rate is equal to the minimum royalty rate specified in the IMLA regulations. See 25 C.F.R. 211.43(a)(2) (2001).

leases; the other (130 DM 10.5) merely describes the functions of the Department's former Division of Energy and Minerals Resources and does not purport to call for an analysis in any particular circumstance. Moreover, those manual provisions are for internal agency guidance only, were not published in the *Federal Register*, and do not have the force of a regulation. Cf. *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974); *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). As such, the manuals could not provide the basis for a claim founded on an Act of Congress or implementing regulation, as required by the Tucker Act. As explained above, the IMLA and regulations implementing that Act do not require such an independent economic analysis, in contrast to the IMDA and regulations implementing that Act, which do impose such a requirement for mineral development agreements.

5. The Tribe has not alleged a violation of the Department's regulation specifying the minimum royalty rate for leases subject to the IMLA. That regulation is intended to assure that Tribes receive what the Secretary has determined to be a "reasonable" return. See 56 Fed. Reg. 58,736 (1991) (minimum royalty rates are "helpful in providing additional guidance to potential lessees while providing *reasonable* royalty rates for lessors") (emphasis added). It is the sort of specific regulatory requirement that might be interpreted as mandating compensation if the Secretary approved a lease providing for a lower royalty without determining that the lower rate still afforded the Tribe an adequate return. The Court may therefore assume for present purposes that a failure by the Secretary to ensure, prior to approving a proposed lease, that its terms (or amendments) comply with the regulation specifying the minimum royalty rate to which the parties may agree would support a claim under the Tucker Act. But in 1987, when the lease amendments at issue were approved by the Secretary, the 12 1/2 percent royalty rate agreed to by the Tribe was well

in excess of the applicable minimum royalty rate. See U.S. Br. 34, 38.[10]

C. Principles Derived From The Common Law Cannot Supply A Substantive Right To Damages Not Specified By Congress

The Tribe argues that when, as here, Congress has not prescribed either a specific duty or a damages remedy for alleged breach of trust, "the character of the Government's trust duties *should* be explicated by accepted principles of trust law as a 'necessary expedient.'" Resp. Br. 37 (quoting *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 237 (1985)). That is incorrect. *County of Oneida* did not involve a damages action against the United States or the Tucker Act. The Tucker Act requires a plaintiff not suing for breach of contract to point to the violation of an Act of Congress or implementing regulation, and thus does not authorize claims against the United States based on principles drawn from the common law. See U.S. Br. 46.

According to the Tribe (Br. 36), "Congress should be understood to have imported established principles of trust law" under the Indian Tucker Act. But the Indian Tucker Act entitles Indian plaintiffs to the "same" rights and remedies in suits against the United States as those enjoyed by non-Indians, not more. *Mitchell I*, 445 U.S. at 539; see U.S. Br. 22. Moreover, the Indian Tucker Act could not have "imported" any common law trust principles enforceable against the United States in a damages action such as this because the Indian Tucker Act is merely a jurisdictional provision that did "not create any substantive right enforceable

[10] By 1987, the Department's practice was not to approve IMLA leases with royalties less than the minimum rate for federal coal (*i.e.*, 12 1/2 percent). C.A. App. A1872. But as the Court of Federal Claims noted, "there is no claim by the Navajo Nation that the 1987 approval of Lease 8580, with royalties of 12.5%, ran afoul of that policy." Pet. App. 68a.

against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *Mitchell I*, 445 U.S. at 538, 540.

The Tribe suggests (Br. 38) that reliance on trust law principles "offers stability and predictability." But just the opposite is true. Holding that the United States may be liable in damages for the violation of any duty discoverable by a court in the "interstices" (Br. in Opp. 12) of the law of trusts would turn the Court of Federal Claims into a court of equity and leave federal officials without any clear principles to follow—which specific statutory and regulatory duties supply—in seeking to avoid damages actions in undertaking a multitude of day-to-day actions affecting Indians and Indian resources.[11]

D. In Alleging Generalized Breaches Of Fiduciary Duty, The Tribe Mischaracterizes The Underlying Events

In alleging generalized breaches of fiduciary duty, the Tribe attempts to put the Secretary's conduct in the worst possible light, often making assertions and drawing conclusions that are both disputed and unsupported by the record.

For example, although the Tribe suggests (Br. 7) that the Department "leaked" a draft decision on Peabody's administrative appeal to Peabody and withheld it from the Tribe, the record indicates that Peabody learned of the draft decision from the Tribe. J.A. 99. The Tribe also asserts (Br. 7, 15) that Acting Assistant Secretary Fritz's decision was "final" in July 1985, but that is incorrect. See U.S. Br. 8 n.6; J.A. 125.

[11] Amicus NCAI argues (Br. 21) that there is "a long-established tradition of requiring trustees to pay money damages for fiduciary breaches." But if anything the tradition is *not* to allow damages claims when, as here, the trustee is sovereign. See 2 A. Scott, *The Law of Trusts* § 95, at 17 (4th ed. 1987) ("At common law it was held that a use or trust could not be enforced against the Crown."); Restatement (Second) of Trusts § 95 (1959) ("The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State.").

The Tribe asserts that it lacked knowledge of the Hodel-Hulett meeting, but concedes (Br. 8) that it "did receive a copy of Peabody's July 5, 1985 letter to Hodel." That letter (J.A. 98-100) stated, *inter alia*, that "the Tribe has received word of an imminent and favorable decision on the appeal," and has "suspended [negotiations] until the Department ruled on the appeal of the Area Director's decision." J.A. 99. The letter further urged the Secretary "to (1) assume direct responsibility for this unusual royalty appeal case, and (2) either postpone a judgement to allow for a voluntary settlement or grant Peabody's appeal of the Area Director's decision." J.A. 100. The Tribe also concedes (Br. 10) that it subsequently learned that the Secretary preferred that the parties resume negotiations. See J.A. 342-343 (testimony of Michael C. Nelson). Accordingly, although the Tribe claims (Br. 2) that it negotiated "at a decided bargaining disadvantage," the Tribe was aware that Peabody had affirmatively sought the Secretary's assistance to facilitate a mutually agreed-upon adjustment to the royalty rate; that the Secretary had concluded that the parties should resume negotiations; and that the Acting Assistant Secretary's decision on Peabody's pending appeal "ha[d] not yet been finalized." J.A. 125.

The Tribe accuses (Br. 10) the Secretary of "forcing" it to negotiate with Peabody by delaying a decision on the administrative appeal, but the Tribe had the ability to terminate negotiations unilaterally at any time and could have sought to compel the Department to decide the appeal by requesting that it be transferred to the Interior Board of Indian Appeals. See J.A. 12, 122; U.S. Br. 35. The Tribe suggests (Br. 41) that the negotiations "dragged out" for years. But in fact the parties "quickly reached a tentative agreement" less than a month after resuming negotiations in August 1985. Pet. App. 42a. Although the tentative agreement was not formally approved by the Tribe until 1987, after a political

change in the Tribe's leadership, the agreement approved in 1987 was "essentially the same agreement" reached in 1985, and included a provision for the payment of back royalties at the increased rate of 12 1/2 percent, retroactive to February 1984. Pet. App. 42a; U.S. Br. 9-10.

The Tribe suggests (Br. 9) that the Secretary struck a "deal with Peabody" in July 1985, and improperly thwarted the issuance of a draft decision by his subordinate, Acting Assistant Secretary Fritz. But in his memorandum to Fritz in July 1985, the Secretary said that he "d[id] not necessarily agree" with all the points in Peabody's July 5 letter, but that there would appear to be "significant advantages" to a negotiated solution rather than a royalty adjustment imposed on the parties, which would "almost certainly" lead to protracted and costly appeals and impair the ongoing contractual relationship under the lease. J.A. 117. The Secretary therefore simply "suggest[ed] that [Fritz] inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." *Ibid.* At the same time, the Secretary "assure[d]" Fritz that he had *not* made any decision on "the merits of the arguments of the parties with respect to the issues which are subject to the appeal." J.A. 118.

Finally, the Tribe complains (Br. 11-12) that elements of the package of lease amendments that it negotiated with Peabody were unfair, but does not mention the "many aspects of the renegotiated lease package" that the Tribe's counsel "conceded [in the Court of Federal Claims] * * * are favorable to the Navajo Nation." Pet. App. 50a. In addition, although the Tribe objects to the Secretary's approval of the lease amendments that the Tribe negotiated with Peabody, it fails to acknowledge that its own Tribal Council approved the amendments only after finding that

they were in "the best interest of the [Tribe]." C.A. App. A2432-A2433.

Nor does the Tribe seek to set aside the lease amendments approved in 1987. See Pet. App. 50a ("counsel informed the Court that the Navajo did not wish to invalidate the entire agreement."). Rather, the Tribe seeks to hold on to the "many aspects of the renegotiated lease package that are favorable to the Navajo Nation," *ibid.*, and secure damages from the United States for the Secretary's refusal to insist on an increase in the royalty rate well above what the parties agreed to (from 12 1/2 to 20 percent), and far in excess of the applicable minimum rate for leases subject to the IMLA. Nothing in the IMLA, the Tucker Act, or this Court's decisions sanctions that damages claim.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2002

MOTION FILED

AUG 19 2002

No. 01-1375

(4)

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PEABODY COAL COMPANY, PEABODY WESTERN COAL COMPANY, AND PEABODY HOLDING COMPANY, INC., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Statement of Facts

Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively "Peabody"), by counsel and pursuant to Rule 37.3(b), hereby file their Motion for Leave to File *Amicus Curiae* Brief in this case. In support of their motion, amici make the following showing:

Pursuant to Rule 37(a), by letter dated August 1, 2002, amici sought written consent from Counsel of Record for Petitioner and Respondent. Petitioner's counsel granted written consent.

Respondent's counsel gave consent based upon two conditions: (1) that the amicus be filed timely; and (2) that the amicus brief "not rely on documents that are not in the record," and in particular not rely upon a memorandum dated August 9, 1984 authored by the Manager of the Navajo Nation's Minerals Department.

Peabody's brief is being filed timely. In addition, the amicus brief does not cite or rely upon the August 9, 1984 Navajo Nation memorandum. Because of the conditional nature of the Respondent's consent, and out of an abundance of caution, Peabody is seeking leave to file its amicus brief.

Nature of Peabody's Interest

The Peabody amici have an important interest in this case because Peabody Western Coal Company mines coal on the Navajo Nation reservation. In this action, the Navajo Nation asserts a claim relating to the renegotiation

and amendment of one of the leases under which Peabody operates. Accordingly, the outcome of this case will have a direct impact on Peabody.

Moreover, the Navajo Nation has filed a separate lawsuit against Peabody in the United States District Court for the District of Columbia alleging that the Peabody defendants improperly influenced the federal government's decisions regarding the coal leases at issue in this case. *See Navajo Nation v. Peabody Holding Co.*, Civil Action No. 99-469 (EGS) (D.D.C.). The Navajo Nation has asserted claims against Peabody for breach of contract, aiding and abetting a breach of trust, conspiracy, and fraudulent concealment, as well as claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*

Peabody respectfully submits that its Motion for Leave to File *Amicus Curiae* Brief should be granted.

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QUESTION PRESENTED

Whether the court of appeals properly held that the Navajo Nation could assert a claim for breach of fiduciary duty in connection with the Interior Secretary's actions concerning an Indian coal lease, without finding a violation of any specific statutory or regulatory duty established pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a *et seq.*

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STATEMENT OF INTEREST

Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Company, Inc. (collectively "Peabody"), respectfully submit this brief amici curiae in support of petitioner.[1] Amici have an important interest in this case because Peabody Western Coal Company mines coal on the Navajo Nation reservation. In this action, the Navajo Nation asserts a claim relating to the renegotiation and amendment of one of the leases under which Peabody operates. Accordingly, the outcome of this case will have a direct impact on Peabody.

Moreover, the Navajo Nation has filed a separate lawsuit against Peabody in the United States District Court for the District of Columbia alleging that the Peabody defendants improperly influenced the federal government's decisions regarding the coal leases at issue in this case. *See Navajo Nation v. Peabody Holding Co.*, Civil Action No. 99-469 (EGS) (D.D.C.). The Navajo Nation has asserted claims against Peabody for breach of contract, aiding and abetting a breach of trust, conspiracy, and fraudulent concealment, as well as claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*.

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[1] Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part. No person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' positions on the issue of their consent to the filing of this brief have been submitted to the Clerk. By letter, the Navajo Nation has withheld consent if the amicus brief relies upon matters not of record, and specifically objects to reliance upon a memorandum dated August 9, 1984 from the Navajo Nation Minerals Director. Peabody's amicus brief does not rely upon this memorandum. Nonetheless, in an abundance of caution, Peabody has filed a motion for leave to file its amicus brief.

STATEMENT OF THE CASE

The Navajo Nation's claims are defective because they fail to identify any violation of a specific statutory or regulatory duty. The uncontradicted record demonstrates, as a matter of law, that Peabody did not seek improperly to influence the Interior Department; that there was never any final administrative decision by the Interior Department Peabody allegedly "scuttled"; and that the government did not improperly "rubber stamp" the lease amendments. (Respondent's Opposition to Cert. Petition, at 9). It is clear, as a matter of law, that the Navajo Nation could not possibly have been injured by any of the alleged misconduct. The 1987 lease amendments negotiated by Peabody and the Navajo Nation provided the Navajo Nation with a royalty rate of 12.5%, which was as high as any of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states between 1985 and 1996, and with a host of additional benefits (such as increased payments for water use and recognition of Navajo Nation taxation on coal).[2] In fact, in 1998 and 1999 the Navajo Nation told the Interior Department that the 12.5% rate was in the "best interest" of the Navajo Nation, and otherwise satisfied the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a ("IMLA"), and its implementing regulations, 25 C.F.R. § 211.43.

A. Peabody Makes Substantial Investments Benefitting the Navajo Nation.

In the 1960s, Peabody discovered large reserves of coal on the Navajo Nation reservation under coal

[2] Peabody has lodged with this Court excerpts from a summary of public records compiled by an expert describing the royalty rates on each of the 471 Western federal, state, and tribal coal leases from 1988 to 1996, and those dating back to 1985. [L001-03]

exploration permits.[3] Peabody then entered into two leases with the Navajo Nation to mine coal in Arizona on the Navajo Nation reservation. Under these two leases, the North Lease (Lease No. 8580) and the South Lease (Lease No. 9910),[4] Peabody is required to pay the Navajo Nation coal royalties.

Because the Navajo Nation's coal was located very far from any significant market, successful and profitable development of the coal required mastering unique and expensive transportation obstacles. The high cost of transportation made development of the coal uneconomic. These obstacles were overcome by construction of a 90-mile dedicated railroad and a 273-mile coal slurry pipeline – the longest coal slurry pipeline in the world. [JA 352-53] Peabody created valuable markets for Navajo coal by entering into coal supply agreements with utility companies that, in reliance thereon, constructed two large power generating facilities (the Navajo and Mohave Generating Stations) near or on the reservation to be fueled exclusively by Navajo coal.[5] In the years following execution of the leases, Peabody brought the benefits of a first class coal mining operation and many jobs to the Navajo Nation. [JA 352]

The original North Lease provided that its royalty rate was subject to adjustment twenty years after its effective date, that is, on February 1, 1984. The original South Lease contained no royalty rate reopener provision. The reopener in the original North Lease indicated that

[3] The exploration permits and original leases were executed by a predecessor Peabody company known as Sentry Royalty Company.

[4] The South Lease involves coal that the Navajo Nation jointly owns with the Hopi Tribe.

[5] The parties agreed below that "The [North] Lease was and is one important part of a larger initiative to provide electricity and water to the American Southwest by the United States Bureau of Reclamation and the owners of the Mohave and NGS plants. . . ." Consolidated Statement of Proposed Uncontroverted Facts, at 1.

the parties could negotiate a royalty rate adjustment, or, failing that, the Interior Secretary could make a "reasonable adjustment" by February 1, 1984.

In 1979, Peabody initiated efforts to negotiate an increase in the royalty rates under the North and South Leases, even though no reopener was required under the South Lease, and the North Lease reopener was not available for another five years. Peabody proposed changing the royalty rate from a volume-based rate to one based upon a percentage of gross revenues. This change would enable the Navajo Nation to share directly in a rising coal price. Peabody also proposed that the commercially prevailing royalty rate of 12.5% be used.[6] From 1979 to 1984, various Navajo Nation representatives concurred with this rate. Completing negotiations proved difficult, however, because of changing Navajo Nation administrations. A substantial part of these negotiations related to matters other than the royalty rate on the North Lease, including: increased payments for water use; recognition of Navajo Nation taxation on coal; and increasing the royalty rate on the South Lease which did not provide for any royalty rate reopener.

[6] In 1976, Congress established 12.5% as the "minimum" royalty rate for federal coal in the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. § 207(a). While characterized as a "minimum" federal rate by Congress, this was in fact the highest rate at the time, with the average rate at the time only approaching 8%. *See, e.g.* H.R. Rep. No. 94-681, at 57-58 (1975) ("The Department of Interior reports that 12.5% is the current ceiling on coal leases."), *reprinted in* 1976 U.S.C.C.A.N. 1943, (1981). The Interior Secretary opposed passage of such a rate "at or near the historic high." See 122 Cong. Rec. 19, 379-80 (1976). To prevent federal coal from becoming uneconomical because of the 12.5% rate, however, the Interior Department was authorized to reduce the rate, and it has issued regulations governing reductions from the 12.5% rate. 30 U.S.C. § 209; 43 C.F.R. § 3485.2(c).

B. The Navajo Nation Unilaterally Procures a Royalty Rate Adjustment for the North Lease in 1984.

The twenty year anniversary of the North Lease expired on February 1, 1984. Later in the spring of 1984, the Navajo Nation nonetheless initiated a unilateral effort to obtain a royalty rate adjustment on the North Lease from the Interior Secretary. In a March 26, 1984 letter sent privately to Interior Secretary Clark, the Navajo Nation Chairman requested that the Secretary make a reasonable royalty rate adjustment on the North Lease to a minimum of 12.5%. The Navajo Chairman also asked the Secretary for his assistance in obtaining a "voluntary adjustment" of the royalty rate on the South Lease. Navajo Nation Statement of Genuine Issues, at ¶ 25. The Navajo Nation did not send Peabody a contemporaneous copy of this letter.

In April 1984, the Navajo Nation Chairman sent two private letters seeking a royalty rate adjustment directly to Area Director Donald Dodge of the Bureau of Indian Affairs ("BIA"), whose office is located in Window Rock, Arizona, in a building adjoining that of the Navajo Nation Chairman. Mr. Dodge was a member of the Navajo Nation and a political supporter of the Navajo Nation Chairman. With these letters to Area Director Dodge, the Navajo Chairman submitted two studies purportedly justifying a royalty rate increase in excess of 12.5%. As with his prior correspondence to Secretary Clark, the Navajo Nation Chairman did not send Peabody a copy of this letter or its enclosures.

On June 18, 1984, BIA Area Director Dodge signed a document that purported to contain his conclusion that a 20% royalty rate was appropriate for the North Lease. Notice of this decision was sent to Peabody and to the Navajo Nation Chairman. The Area Director's cover letter to the Navajo Nation Chairman reveals that the adjustment was made "in consultation with the Navajo Nation's Minerals Department and Department of Justice." In addition, the Area Director's cover letter mentions that it

had completed legal research on the "effective date" of the North Lease, and that it was effective on August 28, 1964. The parallel cover letter to Peabody omits this language and instead indicates that the Dodge decision was made based upon "reports and recommendations from the Bureau's Navajo Area and Energy and Minerals Resources Office, the Bureau of Mines, and others." Peabody was not provided a copy of the Dodge cover letter to the Navajo Nation Chairman. The Navajo Nation Chairman was, however, furnished a copy of the BIA's cover letter to Peabody.

During discovery in this case, Donald Dodge was asked about his role in making this decision. Dodge testified that he was not told where the twenty percent figure came from, and did not know who had recommended the decision other than a subordinate who presented the decisional document for his signature. (Dodge Dep. 36-44).

Peabody promptly sought administrative review of the Area Director's decision and made clear that it would challenge both the timeliness of the rate adjustment and the accuracy of the flawed studies upon which it was allegedly based. These studies were based upon flawed assumptions about mining profitability, including the complete failure to account for tribal taxation.[7] Moreover, under applicable precedent, an untimely royalty rate adjustment was legally invalid. *See, e.g., Rosebud Coal Sales Company v. Andrus*, 667 F.2d 949 (10th Cir. 1982) (failure to give timely notice of coal lease readjustment renders adjustment invalid). *See also*, 43 C.F.R.

[7] Because the Dodge rate decision was made in consultation with the Navajo Nation Minerals Department, the Navajo Nation had copies of the reports upon which it was allegedly based, but Peabody did not. DPF 30-31; DA 132; I-PA 287. After the Dodge decision, Peabody initiated Freedom of Information Act requests to obtain these reports from the Interior Department.

§ 3451.1(c)(1) (failure to give timely notice of adjustment to federal coal lease waives right to readjust).

If the Navajo Nation were to litigate these issues, it faced the prospect of losing any royalty adjustment on North Lease coal coupled with the loss of the opportunity to negotiate a rate reopening on the South Lease. Almost immediately after the Dodge rate determination of June 1984, the Navajo Nation Chairman proposed to Peabody that the royalty rate be adjusted to 12.5% on both leases.

C. Peabody Seeks Administrative Review of the 1984 Dodge Rate Determination.

The Dodge rate determination was presented to Peabody as a fait accompli. On July 16, 1984, Peabody sought administrative review of the Dodge rate within the Interior Department. In turn, the Navajo Nation also sought administrative review of that aspect of the Dodge ruling concluding that the lease effective date was August 28, 1964, and also affirmatively sought to cancel the lease in the event the Dodge rate was not upheld. Navajo Nation Summary Judgment Brief, at 11.

In 1984, the applicable Interior Department regulations provided two different tracks for securing administrative review of an Area Director's decision. The method both Peabody and the Navajo Nation invoked was administrative review by the Indian Commissioner pursuant to 25 C.F.R. § 2.19 (1984).[8] Peabody sought such review on July 16, 1984, and thereafter filed briefs challenging the merits and timeliness of the Dodge rate determination.

The second available track was to seek an administrative adjudication by the Board of Indian Appeals. This track is formal in the sense that it is governed by separate regulations providing for discovery rights, hearings, and

[8] At the time, Deputy Assistant Secretary Fritz was substituting for the Indian Commissioner because of a vacancy at the position.

other procedures common to formal adjudication proceedings, including an express prohibition on ex parte communications with the Board. 43 C.F.R. § 4.27(b). Neither party ever sought review of the Dodge rate determination by the Board of Indian Appeals.

Under 25 C.F.R. § 2.19(b) (1984), a matter which is fully briefed, but still pending before the Indian Commissioner after thirty (30) days becomes amenable to the jurisdiction of the Board of Indian Appeals. Under applicable agency precedent, after the expiration of this thirty-day period, any party can invoke the jurisdiction of the Board of Indian Appeals by filing a notice of appeal or by moving the Board to assume jurisdiction. *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary-Indian Affairs*, 11 IBIA 146, 153 (April 4, 1983). Once the Board of Indian Appeals takes jurisdiction over an unresolved matter presented initially to the Indian Commissioner, however, the Indian Commissioner is divested of jurisdiction over the matter. *Interim Ad Hoc Comm. of the Karok Tribe v. Area Director, Bureau of Indian Affairs*, 13 IBIA 76, 84 (January 8, 1985) (noting that this was declared policy of the Department for a considerable period of time).[9]

The last brief was submitted to Acting Indian Commissioner (Deputy Assistant Secretary Fritz) on January 30, 1985, and hence the matter could have been transferred to the Board of Indian Appeals on or after March 2, 1985. Neither party so requested. The Navajo Nation was aware of its rights in this regard, as its counsel sent a letter dated February 25, 1985 to Deputy Assistant Secretary Fritz pointing out that, under the regulation, he was required to issue a decision by March 2, 1985, thirty days after the filing of the last brief.

[9] Under applicable regulations, the Interior Secretary had the authority to assume direct responsibility for matters pending before either the Indian Commissioner or the Board of Indian Appeals. 43 C.F.R. § 4.5.

On July 5, 1985, Peabody sent a letter to newly appointed Interior Secretary Hodel, with a copy to the Navajo Nation, urging the Secretary to postpone resolution of the administrative proceedings in favor of a voluntary settlement by the parties. Subsequently in July 1985, a consultant, retained by Peabody at the suggestion of Southern California Edison[10] and known to Secretary Hodel, met directly with Secretary Hodel to ask that any ruling be deferred to allow the parties to complete ongoing settlement negotiations. Shortly thereafter, Secretary Hodel sent a memorandum to Deputy Assistant Secretary Fritz, a draft of which was prepared by Peabody, urging that a hasty decision not be made and that the settlement negotiations be promoted.

In response to the letters of the Navajo Nation and Peabody about the status of the administrative review process, on August 29, 1985, the Interior Department accurately informed the parties by letter that:

> As you are aware the briefing schedule has been completed and a decision on the appeal is currently being considered by the Deputy Assistant Secretary – Indian Affairs and his staff. They are aware of both Peabody's and the Tribe's concerns regarding settlement but the decision has not yet been finalized.

Navajo Nation v. United States, 46 Fed. Cl. 217, 223 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

This letter placed the Navajo Nation on notice that the briefing process was complete and that Deputy Assistant Secretary Fritz had reached no decision. If the Navajo Nation had wanted to invoke the jurisdiction and adjudicatory processes of the Board of Indian Appeals, it could

[10] Southern California Edison ("SCE") was the operator of the Mohave Generating Station, a customer of Navajo Nation coal, and it had also sought administrative review of the Dodge rate ruling.

have done so. Instead, as the Court of Federal Claims noted, upon receipt of this letter, the Navajo Nation resumed negotiations with Peabody, and the parties reached a tentative settlement within a month adopting the 12.5% royalty rate for both the North and South Leases. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 223 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

D. The Parties Enter Into a Settlement Agreement and Lease Amendments in 1987.

Because of an intervening change in Navajo Nation administration, the tentative settlement was not finalized until November 1987. 46 Fed. Cl. at 224. At that time, the parties executed the 1987 Lease Amendments which provided substantially increased financial benefits for the Navajo Nation, including: a 12.5% royalty rate for the coal mined on the South Lease;[11] retroactive royalty payments back to February 1, 1984; recognition of an additional tribal tax of up to 8% on coal sold; a large increase in water payments from $5 to $150 per acre-foot; new Navajo scholarships; and additional coal bonus provisions. [JA 281, 287, 291, 292, 295, 299] As noted by the Court of Federal Claims, the new agreement "permit[ted] the tribe to realize as much as 20.5 percent yield in royalties and taxes combined." 46 Fed. Cl. at 224. Moreover, as the Court of Federal Claims accurately observed, "the agreement obviated a long, costly, and uncertain legal challenge by Peabody." 46 Fed. Cl. at 224. The Navajo Nation thereafter sought and obtained Secretary Hodel's approval of the 1987 Lease Amendments.

[11] Because the Navajo Nation held an undivided one-half joint interest with the Hopi Tribe on South Lease coal, the Navajo Nation's royalties on its interest in South Lease coal was increased to 6.25%, for an overall royalty rate of 12.5%.

The 1987 Lease Amendments expressly acknowledged that the parties had a dispute as to the validity and reasonableness of the Dodge rate determination [JA 286] (1987 Lease Amendments, ¶ 4); that in consideration of the new lease benefits, the Navajo Nation agreed jointly to move the Secretary to vacate the Dodge rate determination and "render that royalty adjustment decision to be without legal force or effect" (*id.*); and that the Navajo Nation recognized the 1987 Lease Amendments are "valid and enforceable and in the best interests of Lessee and Lessor and its people." [JA 308] (1987 Lease Amendments, ¶ 13).

E. The Navajo Nation Reaffirms the 12.5% Royalty Rate as the Equitable Rate in 1998 and Then Seeks and Obtains Secretarial Approval of This Rate.

The 1987 Lease Amendments provided that the royalty rates on both leases would automatically continue at the 12.5% rate after ten years, unless one of the parties expressed dissatisfaction with this rate, at which time the parties could obtain an adjustment by negotiation or by binding arbitration setting the "equitable royalty rate, considering the interests of Lessor, Lessee, and the Navajo and Mohave Participants." [JA 283] (1987 Amendments, ¶ 3). During 1997 and 1998, the Navajo Nation sought a royalty rate increase first by negotiation and then by arbitration in Arizona.

In September 1998, the Navajo Nation and Peabody agreed to a new set of lease amendments in settlement of the royalty rate arbitration proceedings initiated by the Navajo Nation. Pursuant to the 1998 arbitration settlement agreement, the parties submitted a stipulated final arbitration award to the arbitration panel continuing the royalty rate of 12.5% at least through December 2007, which the arbitrators adopted as their final arbitration award. Also pursuant to the 1998 arbitration settlement

agreement, the parties executed the 1998 Lease Amendments which continued the 12.5% royalty rate, and reaffirmed all other unmodified terms of the leases.

Pursuant to the terms of the 1998 arbitration settlement agreement, the Navajo Nation submitted the 1998 Lease Amendments to Interior Secretary Babbitt for his recommended approval under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a ("IMLA"). In March 1999, Interior Secretary Babbitt approved the 12.5% royalty rate contained in the 1998 Lease Amendments as being in the best interest of the Navajo Nation under the IMLA.[12] [L006-07] More specifically, Secretary Babbitt pointed out that under the applicable Interior Department regulations (promulgated in 1996), the Interior Secretary did not have to determine whether this rate was in the "best interest" of the Navajo Nation because it met the 12.5% royalty rate requirement of 25 C.F.R. § 211.43(a). [L006] Nonetheless, Secretary Babbitt directed the Interior Department to conduct an economic analysis and review of the lease amendments and, on the basis of that analysis and review, determined that they were in the best interest of the Navajo Nation under IMLA. [L006]

Notwithstanding the Navajo Nation's agreement in 1998 to a 12.5% royalty rate under the leases, its subsequent application for Secretarial approval of this rate, and its successful demand for millions of dollars in bonus payments under the lease amendments, the Navajo Nation initiated secret litigation against Peabody in the United States District Court for the District of Columbia in February 1999, alleging that the lease royalty rates should be retroactively reformed to the 20% rate set by BIA Area

[12] Peabody has lodged with this Court a copy of Secretary Babbitt's March 29, 1999 decision approving the 12.5% royalty rate as satisfying both IMLA and implementing regulations. 25 U.S.C. § 639a; 25 C.F.R. § 221.43(a). [L004-07]

Director Dodge in 1984.[13] As the District Court has since noted, however, the Dodge rate was a "unilateral[]" adjustment that "was in excess of the 12.5% and lesser rates applied in other coal leases during the period of 1985 to 1996." *Navajo Nation v. Peabody Holding Co., Inc.*, __ F. Supp.2d __, 2002 WL 1457121 (D.D.C. June 24, 2002).[14] In fact, the Navajo Nation's two coal leases with other companies also have a 12.5% royalty rate. [L003]

F. The Navajo Nation Sues the Interior Department in the Court of Federal Claims.

In 1993, the Navajo Nation brought a two-count complaint against the Interior Department in the Court of Federal Claims alleging that the Interior Secretary had breached trust and contract obligations during the rate adjustment process in the 1980s. In December 1997, the Navajo Nation sought summary judgment, alleging that the Interior Secretary had breached his trust obligations by engaging in a prohibited ex parte conversation with Peabody's consultant in July 1985.

In February 2000, the Court of Federal Claims dismissed the Navajo Nation's suit for lack of jurisdiction because the Navajo Nation had not established a breach by the Secretary of any trust obligation that could give rise to a duty to pay money damages. *Navajo Nation v. United*

[13] The Navajo Nation's original complaint was filed under seal in February 1999, but it was never served upon Peabody or the other defendants. On June 25, 1999, the Navajo Nation filed an amended complaint asserting a civil RICO claim under 18 U.S.C. § 1964(c) and served this public complaint upon Peabody.

[14] In making this assertion, the District Court relied upon an unrebutted expert report submitted by Peabody which indicated that, without exception, all of the 471 federal, state, and tribal coal leases in the West used rates of 12.5% or less during the period from 1988 to 1996. Excerpts from this document have been lodged with this Court. [L001-03]

States, 46 Fed. Cl. 217, 229 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002).

The Court of Federal Claims examined the Secretary's duties under the IMLA, 25 U.S.C. § 396, and its implementing regulations, 25 C.F.R. § 211, and concluded that they did not impose a sufficient degree of managerial responsibility upon the Interior Secretary over Navajo Nation coal leasing as to create a duty that could provide the foundation for money damages under this Court's holding in *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). 46 Fed. Cl. at 233. In the Court of Federal Claims, the Navajo Nation noted that, as a policy matter, the Secretary would not approve coal leases with royalty rates less than those the federal government "would receive for its own coal – at that time and now, apparently, 12.5%" *Id.* The court observed that the 1987 Lease Amendments therefore did not run afoul of that Interior Department policy. *Id.*

Despite its finding of no jurisdiction based upon the lack of a statutory or regulatory duty, the Court of Federal Claims went on to examine whether Secretary Hodel had breached a common law duty to the Indians because of the alleged ex parte meeting with Mr. Hulett in July 1985. While acknowledging that the Secretary's duties are not equivalent to those of a common law trustee, the Court of Federal Claims concluded that Secretary Hodel had violated a trustee's common law duty by engaging in an alleged prohibited ex parte communication. The Court of Federal Claims suggested, without elaboration, that the Navajo Nation's alleged lack of information about Peabody's communication with the Secretary would have harmed them in their negotiations.[15] In any event, the

[15] A more logical inference, however, is that the Navajo Nation would have negotiated from what it perceived as a stronger position if it truly labored under the misimpression that a favorable decision by the Secretary was imminent. The fact that the Navajo Nation agreed to a 12.5% royalty rate under these circumstances supports the conclusion

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Court of Federal Claims held that any common law duty regarding ex parte communications, and its alleged breach by the Secretary, did not create a duty for which money damages could be awarded. 46 Fed. Cl. at 227.

The Federal Circuit reversed, holding that the IMLA imposes a statutory duty to manage the Navajo Nation's mineral assets "in a manner that maximizes their benefit to the Indians." The Federal Circuit did not identify any breach of a specific statutory or regulatory duty. In particular, the court did not hold that the 12.5% royalty obtained by the Navajo Nation violated any statutory directive under the IMLA, and such a holding could not have been made given the undisputed evidence that this was the universally applicable rate, even for federal coal.

Nor did the Federal Circuit address the uncontradicted evidence establishing that there was no misconduct and no harm to the Navajo Nation. Indeed, the court misstated the nature of the proceedings below. For example, the original opinion stated that, "[b]y suppressing the royalty decision of the Interior's Board of Indian Appeals, the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals." Slip opinion, at *6. The Federal Circuit was mistaken: there was no proceeding before the Board of Indian Appeals, much less a decision by that administrative body. The Court thereafter corrected its opinion to conclude that the Secretary's breach was in "suppressing the decision of the Deputy Assistant Secretary for Indian Affairs." *Navajo Nation v. United States*, 263 F.3d 1325, 1332 (Fed. Cir. 2001). Likewise, however, there was never any decision of the Deputy Assistant Secretary for Indian Affairs, as he confirmed in his uncontradicted deposition testimony.

that this rate, along with the other elements of the negotiations, was deemed beneficial by the Navajo Nation.

In a concurring and dissenting opinion, Judge Schall acknowledged that the Secretary has general fiduciary obligations, but concluded that this Court's precedent required more than this – that the court must "find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship." 263 F.3d at 1339. The dissenting opinion concluded that no such specific fiduciary responsibility was created by the statutes and regulations cited by the majority opinion regarding the Secretary's actions during the administrative review process.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals should be reversed and the case dismissed for lack of jurisdiction because the Secretary did not violate any specific statutory or regulatory duty established pursuant to the IMLA or the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The undisputed record demonstrates that there was no breach of any duty, nor (as a matter of law) could the Navajo Nation have possibly been harmed.

The Secretary did not breach any procedural duty to the Navajo Nation. No statute or regulation, under either IMLA or the APA, prohibited the Secretary from meeting privately with Peabody during the informal administrative review. In fact, the Navajo Nation understood that ex parte contacts were perfectly permissible during the rate readjustment process, and it is undisputed that the Navajo Nation itself engaged in numerous such ex parte contacts with Interior Department officials. Under *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), federal courts may not impose procedural requirements on administrative agencies beyond those set forth in the applicable statute and regulations. That principle is especially salient here, because Peabody's right to contact the Secretary was protected by the First Amendment and cannot provide a basis for civil damages.

Nor is there any merit to the Navajo Nation's claim that the Interior Department breached its fiduciary duty because the Secretary supposedly "scuttled" a final decision by the Indian Commissioner. It is undisputed that the Commissioner had not made a decision. Even if he had, the Secretary would not have breached any duty by overruling it. Further, there could not have been a breach, as a matter of law, because the Navajo Nation failed to exhaust administrative remedies available to it. These remedies could have addressed any procedural infirmities identified by the Navajo Nation.

The Court of Appeals also erred because the Secretary did not breach any substantive duty owed to the Navajo Nation under applicable statutes and regulations. It is undisputed that, between the years 1988 and 1996, none of the 471 federal, state, and Indian coal leases in the Western coal-producing states had a royalty rate higher than 12.5%.[16] The 1987 Lease Agreements provided the Navajo Nation not only with a 12.5% royalty rate, but also additional benefits, such as increased payments for water use, recognition of Navajo Nation taxation on coal, and an increased royalty rate on the South Lease, which did not provide for any royalty rate changes.

As recently as 1998 and 1999 the Navajo Nation again represented to the Interior Department that the 12.5% rate satisfied the IMLA and was in the "best interest" of the Navajo Nation. [L004] Any claim that the Interior Secretary is obliged to maximize Indian revenues is foreclosed by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989). Moreover, such a claim would represent a judicially imposed obligation not supportable by any specific statutory or regulatory duty and would therefore violate the separation of powers.

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[16] See Lodged Material at L002-03. Not only do the 471 Western coal leases from 1988 to 1996 all use the rate of 12.5% or less, public records reveal that this is also true for federal, state, and tribal coal leases dating back to 1985. [L003]

The Secretary does not have a broad fiduciary duty to manage all Indian mineral leases under the IMLA. The government is not to be treated as a common-law trustee. The Court of Appeals erred by holding that the Navajo Nation may assert a claim for breach of trust without identifying any specific statutory or regulatory duty.

ARGUMENT

Under this Court's precedent, to bring a damages suit, the Navajo Nation must demonstrate that the Interior Secretary violated a specific duty imposed by statute or regulation. In order to impose liability, the statutory scheme must *both* "establish a fiduciary relationship and define the contours of the United States fiduciary responsibilities." *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).[17] Thus, prior to the decision below, it was well established that the United States could be held liable only if it violated a specific fiduciary duty imposed by a statutory scheme. *See, e.g., Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996); *Pawnee v. United States*, 830 F.2d 187, 191-92 (Fed. Cir. 1987).[18] For this reason, "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary, the money claim against the government must fail." *Brown*, 86 F.3d at 1563; *Pawnee*, 830 F.2d at 191-92.

In this case, the pertinent statute, IMLA, does not make the United States a fiduciary with full responsibility for the management and control of mineral resources for all Indian tribes. On the contrary, IMLA was purposely designed to promote tribal autonomy and economic

[17] A court is not free to "supplement" the statutory scheme. *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74-77 (1996).

[18] *Accord, Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[T]he government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations."). *See also Band of Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

independence. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1112-13 (9th Cir. 1981) (Congress intended to give Indians control over lease decisions). Thus, as the United States has demonstrated elsewhere,[19] the statute here is not comparable to the statute found sufficient to trigger such a duty in *Mitchell II*.

But, in any event, it is decisive here that no liability may be imposed unless plaintiff can demonstrate that the Secretary violated a specific statutory or regulatory duty. The Navajo Nation cannot satisfy that requirement.

A. The Secretary Did Not Breach Any Procedural Duty to the Navajo Nation.

The Secretary's conduct during the administrative review process did not run afoul of any procedural duty owed to the Navajo Nation under the informal administrative review process initiated by both Peabody and the Navajo Nation. There is no statute or regulation, under either IMLA or the APA, 5 U.S.C. § 706, that prohibited Secretary Hodel from meeting or talking separately with Peabody during the pendency of the informal administrative review process. Neither the Navajo Nation nor the Federal Circuit's majority opinion have identified any statute or regulation that prohibited the Interior Secretary from meeting separately with Peabody. Notably, the *formal* track of administrative review in the Board of Indian Appeals – which neither party in this case invoked – includes an express prohibition on ex parte communications. 43 C.F.R. § 4.27(b). The *informal* process elected by the parties in this case contained no such prohibition.

In fact, the Navajos understood that ex parte contacts were entirely permissible during the rate readjustment process. In an attempt to win a higher royalty rate in the spring of 1984, the Navajo Nation itself made a series of ex parte contacts with the Interior Department, the BIA, and

[19] *See* Pet. 16-23.

the BIA Area Director (Donald Dodge) without notice to Peabody. The Navajo Nation worked secretly with Dodge in adjusting the royalty rate, without any notice to Peabody.

It has been established for decades that federal courts may not impose procedural requirements on administrative agencies beyond those set forth in the applicable statute and regulations. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990) ("*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies procedural requirements that have no basis in the APA;" applying *Vermont Yankee* to informal agency adjudication); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); *District No. 1, Marine Eng'rs' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000). This Court has repeatedly held that administrative agencies have discretion to be flexible in the administration of their own procedural rules. *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).

Vermont Yankee made clear that a court's duty in reviewing agency procedures is simply to determine whether the agency has complied with the applicable statutes and regulations, not to impose special procedural requirements on the agency based on the court's own notions of what procedures would be most desirable. 435 U.S. at 549. Following *Vermont Yankee*, courts have held that, absent an express statutory prohibition on ex parte contacts with an agency decisionmaker, agencies are free to make decisions through such contacts. *District No. 1 Marine Eng'rs' Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000).[20] "Generally, *ex parte*

[20] *See also Portland Audubon Soc'y. v. Endangered Species Comm.*, 984 F.2d 1534, 1540-42 (9th Cir. 1993); *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (post-comment, ex parte meetings do not

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contact is not shunned in the administrative agency arena as it is in the judicial context." *Texas Office of Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1537 (2002). Indeed, "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility and amenability of these officials to the" public. *Id.* (citations and quotations omitted).

No statute or regulation prohibited contact with the decisionmakers on the informal track. The IMLA does not address – and therefore does not preclude – ex parte contacts. The more general framework of the APA does not prohibit ex parte contacts under the circumstances presented here. Congress specifically limited the APA prohibition on ex parte contacts to agency proceedings in which the governing statute requires a hearing "on the record." *See* 5 U.S.C. §§ 557(a), (d)(1); H.R. Rep. No. 880, at 19, *reprinted in* 1976 U.S.S.C.A.N. 2201. None of the applicable IMLA sections provides for hearings on the record; hence none of the proceedings under those sections is subject to the APA's ban on ex parte communications.[21] *See*

invalidate rulemaking in absence of statute barring such communications); *Marketing Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1309 (D.C. Cir. 1977) (ex parte communications in informal notice and comment rulemaking not barred by APA); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1048 (N.D. Calif. 1993); *See generally* Davis & Pierce, Administrative Law Treatise § 7.6, at 480 (4th ed. 2002) ("[E]x parte communications are highly desirable, and perhaps even constitutionally protected, in context of a rulemaking to resolve a policy issue.").

[21] However characterized, the administrative process employed by Deputy Assistant Secretary Fritz was not a formal adjudication. Section 554 of the APA provides that formal adjudications – to which the ex parte prohibitions of section 557 apply – are limited to adjudications "required by statute to be determined on the record after an opportunity for an agency hearing." Here, no hearing rights were provided by statute to Peabody, and no hearing rights were afforded to Peabody by the Interior Department. Internal Interior Department documents suggest that the Department considered providing hearing rights, including by means of a referral to the Board of Indian Appeals for

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Maritime Admin., 215 F.3d at 42 (citing *Vermont Yankee*); Davis & Pierce, Administrative Law Treatise § 8.4, at 543 (4th ed. 2002) ("The APA prohibitions on ex parte communications do not apply . . . to informal adjudications."). Similarly, no regulation bars ex parte contacts in proceedings before the Indian Commissioner.[22]

Here, when no statute or regulation addressing approval of Indian mineral leases prohibits Secretarial communications with interested outsiders such as Peabody, courts should be especially reluctant to impose new procedures post-hoc. Further, the Secretary's actions here, though taken pursuant to contract, were more in the nature of legislative acts rather than adjudicatory in character,[23] and the First Amendment's Speech and Petition Clauses protect the rights of citizens to lobby government officials engaged in such legislative functions. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (referring to "lobbying" worthy of constitutional protection under the First Amendment"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546

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appointment of an administrative law judge, but no such rights were ever afforded. Navajo Nation Exhibit 51. The Board of Indian Appeals is authorized to initiate hearings through the appointment of administrative law judges. 43 C.F.R. § 4.337(a).

[22] Under the regulations in place at the time, the Commissioner of Indian Affairs was required to record only what he relied upon, and he could make use of "any information available to [him] . . . *whether formally part of the record or not*. . . ." 25 C.F.R. § 2.20 (1984) (emphasis added).

[23] *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366 (1994) ("Rate-making is essentially a legislative function") (quoting *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945)); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989) (because "ratemaking is an essentially legislative act," "the Council's proceedings here were plainly legislative"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion.") (quoting *Simpson v. Shepard*, 230 U.S. 352, 433 (1913) (*Minnesota Rate Cases*)).

(1983) (treating lobbying as an exercise of "First Amendment rights"); *Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) ("the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives").

The Navajo Nation's additional contention – that Interior breached its fiduciary duty because the Secretary intervened in the decisionmaking process and supposedly "scuttled" a final decision by the Commissioner – is equally without merit. There was no "decision" to suppress because no *decision* had been made. The draft decision had not yet been signed or forwarded to the parties by certified or registered mail. *See* 25 C.F.R. § 2.19 (1984) ("Commissioner's written decision in each case shall be forwarded to each known interested party by certified or registered mail, return receipt requested"). Indeed, under the applicable agency regulations, there never was a final decision that could be the subject of judicial review. 43 C.F.R. § 4.21(b) (requiring exhaustion of administrative remedies, and declaring non-final and not subject to judicial review any decision which was subject to appeal to Board of Indian Appeals). The unexecuted, draft document that was under consideration by Assistant Secretary Fritz was no more an agency decision than any other draft circulating before a subordinate agency official.

Traditional administrative law principles permit the head of a department to preempt or direct action by his subordinates as long as the regulations do not expressly deprive him of that discretion. *See Knight v. United Land Ass'n*, 142 U.S. 161, 176-82 (1891) ("As a general proposition of administrative agency law, the head of [the Interior Department] has the power to review and revise acts of subordinates where, as here, the powers in question are vested in the subordinate under the supervision and direction of the superior or the power to administer is

vested in the superior.").[24] Here, no Interior Department regulation prohibited the Secretary from exercising his authority in this case.[25]

In any event, the Secretary did not violate any specific statute or regulation in suggesting a delay in the proceeding in the expectation that the parties would settle the dispute. Just as there is a federal judicial policy promoting the settlement of complex litigation,[26] agencies are free to promote private resolution of complex disputes, especially when only one aspect of a complex multi-party dispute is before the agency. Here, for example, the Secretary also had responsibilities to the Hopi Tribe, and the voluntary increase of the royalty rate on the joint use coal of the South Lease through negotiations – a matter over which the Secretary had no administrative authority – would redound to the benefit of both the Navajo Nation and the Hopi Tribe. This and other complex issues, including tribal taxation and water use rights, were at issue in these multiparty negotiations, and they were ultimately resolved by negotiation.

The absence of a more elaborate explanation about the Secretary's action likewise did not constitute a breach of a

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[24] *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) ("intra-Executive Branch meetings . . . and the failure to docket one such meeting involving the President" did not violate APA or due process); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1385-89 (5th Cir. 1979); *See also* Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.9, at 685 (4th ed. 2002) ("ultimate decisionmaking power [is] held by the agency head").

[25] To the contrary, the regulations in place at the time expressly reserved to the Secretary the "authority to review any decision of [any] Department employee." *See* 43 C.F.R. § 4.5(a)(2) (1985); *see also* 43 C.F.R. § 4.5(a)(1) (1985) (Secretary has "authority to take jurisdiction at any stage of any case before any [Department] employee"). These regulations plainly embrace the lesser step of deferring a decision in favor of settlement negotiations.

[26] *See, e.g.*, *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("it is axiomatic that the law encourages settlement of disputes").

specific fiduciary duty under the regulations. There is nothing in the regulations or in other administrative law principles that requires an agency to disclose its internal deliberations prior to rendering a final decision. Indeed, this Court has specifically rejected the contention that an agency engaged in an informal action such as this one is required to disclose its intentions so as to glean comment from the affected parties. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990). Any rule requiring the parties to be informed of the reasons for an agency's delay in reaching a final decision would wreak havoc with the administrative process. Since the Department of Interior regulations did not require any disclosure of the Secretary's action, there was no breach of a specific duty here.

In addition, there could not have been a breach, as a matter of law, because the Navajo Nation failed to avail itself of alternative remedies provided by the administrative scheme. If the Navajo Nation had been dissatisfied with the lack of progress in concluding the Commissioner's informal review, or if the Navajo Nation had been unhappy with any resulting decision, it could have elected to invoke a more formal process – an appeal directly to the Board of Indian Appeals under 25 C.F.R. § 2.19(b). In addition, the APA provides that any party aggrieved by unreasonable agency delay can seek judicial relief in federal court. 5 U.S.C. § 706(1). It is undisputed that the Navajo Nation did not invoke either remedy in this case, even though it considered taking action to force a decision. [JA 361] Evidently the Navajo Nation did not want to subject the Dodge rate to the formal adjudicatory process of the Board of Indian Appeals, including the prospect of hearings before an administrative law judge focusing on the reliability of the reports upon which the decision was ostensibly based. 43 C.F.R. §§ 4.337 & 4.338 (describing hearing procedures).

Whatever the motivation for the Nation's strategy, its failure to exhaust its administrative remedies means that it cannot identify any breach of a procedural duty or any harm. The relevant regulations specifically require the exhaustion of administrative remedies as a precondition to obtaining judicial review. 43 C.F.R. § 4.21(b). "This Court

long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). Moreover, the administrative remedies shunned by the Navajo Nation would have addressed any previous infirmities in the process afforded the Navajo Nation. *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981) (post-deprivation remedy eliminates any procedural due process claim).

Hence, the Navajo Nation cannot identify any breach of a specific procedural duty. Nor can the Navajo Nation identify any resulting harm.

B. The Secretary Did Not Breach Any Substantive Duty Owed the Navajo Nation By Statute or Regulation.

The Navajo Nation has also been unable to identify any violations of the applicable regulations governing Secretarial approval of lease royalty rates. (25 C.F.R. Part 211, *et seq.* (1985)). From 1985 through 1996, all of the more than 471 federal, state, and Indian coal leases in the Western coal-producing states had royalty rates of 12.5% or lower.[27] None had a royalty rate higher than 12.5%. The 1987 Lease Agreements were thus as favorable as any comparable lease, and also provided additional benefits to the Navajo Nation, including: increased payments for water use; recognition of Navajo Nation taxation on coal; and increasing the royalty rate on the South Lease which did not provide for any royalty rate changes.

In fact, in 1998 the Navajo Nation *again* sought Secretarial approval of a 12.5% royalty rate for the leases. [L004] The Navajo Nation represented to the Secretary that the 12.5% rate satisfied the IMLA and was in the

[27] *See* Lodged Material, at L003.

"best interest" of the Navajo Nation. In 1999, Interior Secretary Babbitt approved this same royalty 12.5% royalty rate – again at the urging of the Navajo Nation – as satisfactory under the IMLA because Interior Department regulations promulgated in 1996 provided that a 12.5% royalty rate for *any Indian mineral lease* satisfied the IMLA and therefore did not require Secretarial approval. [L006]

The Navajo Nation suggests that the IMLA imposes a duty upon the Secretary to maximize Indian mineral lease revenues, and that this duty was allegedly breached by either the Secretary's failure to impose the 20% royalty rate initially selected by Area Director Dodge or the Secretary's approval of the 12.5% rate to which the Navajo Nation independently agreed in 1987.

Yet this Court has flatly rejected the Navajos' legal theory. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989). In the *Cotton* case, this Court traced the lineage of the alleged "broad congressional policy of maximizing revenues for Indian tribes," to a Secretarial letter attached to the congressional reports in the Act's legislative history. *Id.* This Court held that, upon closer examination, the statute contained no such policy of maximizing revenues: "[R]ead in the broadest terms possible, the relevant paragraph suggests that Congress sought to remove 'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Id.* (quoting from S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong., 3rd Sess. 2 (1938)). This Court found "no evidence" for the supposition "that Congress intended to remove all barriers to profit maximization." *Id.* at 180. Indeed, this Court held that it would be "unfathomable" to accord the statute such an interpretation. *Id.* at 179.

The Navajo Nation acknowledges that the Secretary, as a policy matter, would not approve coal leases with royalty rates less than those the federal government "would receive for its own coal – at that time and now, apparently, 12.5%," *Navajo Nation v. United States*, 46

Fed. Cl. 217, 229 (Ct. Cl. 2000), *rev'd*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The Court of Federal Claims properly concluded that the 1987 Lease Amendments did not run afoul of that Interior Department policy. *Id.*

Thus, the Navajo Nation cannot allege – and has not alleged – that the lease's 12.5% royalty rate burdened the Nation with "'disadvantages in [leasing mineral rights] on Indian lands that are not present in applying for a claim on the public domain.'" *Cotton*, 490 U.S. at 179. Indeed, as the District Court for the District of Columbia recently observed, the 12.5% royalty rate was the highest applicable to coal leases from 1985 to 1996. *Navajo Nation v. Peabody Holding Co., Inc.*, 2002 WL 1457121.

Rather than identify – let alone examine – the governing statutory or regulatory duties, the courts below embarked on their own development of common law duties for the agency. Both the Court of Federal Claims and the Federal Circuit sought to build common law duties applicable to administrative agencies from common law sources. The imposition of requirements for particular procedures cannot be justified here by reference to the common law of fiduciary duties. While the government is in a fiduciary relationship with the Navajo Nation, the fact of this relationship cannot justify a court imposing requirements on agencies beyond those imposed by Congress. It is not the judiciary but Congress, pursuant to its exclusive authority over Indian affairs, U.S. Constitution Art. I, § 8, cl. 3 (Indian Commerce Clause); *United States v. Kagama*, 118 U.S. 375, 383-384 (1886), that defines the duties of the Interior Department when it carries out delegated functions.[28] With the exception of the majority

[28] This Court has repeatedly stated that Congress has plenary authority over Indian affairs. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 57

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opinion below, every court that has addressed the issue has held that compliance with the governing statutory provisions equates with compliance with the fiduciary duty.[29] As one court explained, "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998). *Cf. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15-16 (2001).

This Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)). The courts are therefore not free to supplement Congress' scheme by imposing additional, judicially created duties that Interior must follow when approving the lease.[30] "[T]he task of the federal courts is to

(1946); *see also* F. Cohen, Handbook of Federal Indian Law, 207-212 (1982 ed.).

[29] *See Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929-30 (10th Cir. 1994) (affirming district court's ruling that "no breach of fiduciary duty had occurred because the government had enforced all applicable statutes and regulations"); *North Slope Borough v. Andrus*, 642 F.2d 589, 593, 611-13 (D.C. Cir. 1980) (Interior complied with its statutory duties and the common law of fiduciaries cannot justify imposition of additional duties); *California v. Watt*, 668 F.2d 1290, 1325 (D.C. Cir. 1981); *Cobell v. Babbitt*, 91 F. Supp.2d 1, 30 (D.D.C. 1999) ("plaintiffs must point to rights granted by statute if they are to be enforced against the government."); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1487-89 (D. Ariz. 1990), *aff'd sub. nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied sub. nom Havasupai Tribe v. United States*, 503 U.S. 959 (1992).

[30] *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 317 & n.9 (1981) (recognizing preexisting federal common law rules are subject to displacement by congressional entry into a

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interpret and apply statutory law, not create common law." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981); *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). Indeed, the extra-statutory, common law fiduciary duties announced by the Court of Appeals have an almost limitless potential for justifying judicial second guessing of Executive Branch decisionmaking affecting Indians, a judicial role that is inconsistent with separation-of-powers principles.

In sum, the Federal Circuit fundamentally misapprehended the nature of the fiduciary relationship between the federal government and the Navajo Nation. In this setting, Congress has chosen to implement its view of the contours of that relationship by confining the Secretary's role to one of approving the lease. The extra-statutory duties announced by the Court of Appeals find no support in this Court's cases, and they have been rejected by the other lower federal courts who have addressed the issue.

CONCLUSION

For the foregoing reasons, the decision of the Federal Circuit should be reversed, and the case should be dismissed for lack of jurisdiction.

Respectfully submitted,

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particular field); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("courts are not free to 'supplement' Congress' answer").

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF *AMICUS* INTEREST

The National Congress of American Indians ("NCAI") writes to urge the Court to affirm the decision below and to explain why this case matters not just to the Navajo Nation but to her sister Tribes as well. At stake is a principle that is as time-honored as it is widely applicable: When an entity exercises such control over property as to take on trust responsibilities with respect to it, may the beneficiary of that trust relationship obtain monetary relief to remedy a fiduciary breach? To the end of reaffirming that the answer to that question is "yes," NCAI respectfully offers this brief *amicus curiae* for the Court's consideration.*

Established in 1944, NCAI is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaska Native villages and Native American citizens. NCAI has long been, and continues to be, dedicated to protecting the rights and improving the welfare of American Indians.

Like the Navajo Nation, many NCAI members hold land that is subject to the Indian Mineral Leasing Act ("IMLA") and that is subject to the trust relationship that predates the Act and was reinforced by it. NCAI therefore has a fervent interest in ensuring that Tribes may rely on the Government to honor its fiduciary responsibilities when it supervises mineral leases on Indian lands under the Act. And it likewise has a keen interest in ensuring that Tribes may obtain satisfactory relief when the Government fails to honor those responsibilities.

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* Pursuant to Rule 37, *amicus* states that no counsel for a party authored this brief in whole or in part and no person other than *amicus* provided financial assistance in the preparation or submission of this brief. The parties have consented to the filing of this brief, and their consents have been filed with the clerk's office.

STATEMENT

As this case comes to the Court, there is little room for debate that the United States committed a serious breach of its trust duties to the Navajo Nation in the course of reviewing, approving, and supervising the mineral lease that is the subject of this case. Nonetheless, the United States maintains that the Navajo lack a cognizable claim. Success in this argument would necessarily result in summary judgment for the Government. Accordingly, in assessing whether a cause of action does in fact exist here, the Court must assume that a violation of the claimed duties has occurred and must view the underlying facts through the lens of the familiar summary judgment standard. That of course means the Navajo Nation receives the benefit of all favorable inferences. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 332, n.2 (1990).

Under these circumstances, the extensive factual claims made by the Government and its *amicus,* many of them without any proper foundation in the record, are beside the point and indeed serve only to muddy the waters. Properly viewed in the light most favorable to the Navajo, these are the relevant facts:

* In 1964 the Secretary of the Interior, ostensibly acting on behalf of the Navajo Nation, negotiated a lease for Navajo coal deposits with an affiliate of the Peabody Coal Company. The lease contained a low royalty rate of not more than 37.5 cents per ton, but reserved for the Secretary the authority to adjust the royalty rate to a reasonable level after 20 years. *See Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (2000).

* Beginning in 1979 the Tribe and Peabody unsuccessfully attempted to renegotiate the lease. The Tribe then asked the Secretary to exercise his reserved authority to adjust the rate. J.A. 139-41. In response, the Bureau of Indian

Affairs ("BIA") commissioned two studies: each supported an adjustment of the royalty to at least a 20% rate. In light of these studies, the Area Director adjusted the royalty rate to 20%. J.A. 141.

* Peabody appealed to the Commissioner of Indian Affairs who stayed the royalty adjustment pending appeal. The parties submitted briefs in early 1985, and the Tribe requested that the Department approve the 20% rate or terminate the lease due to violations of its provisions by Peabody. J.A. 142, 144.

* Relying on additional, more detailed studies supporting the 20% rate, the Commissioner finalized a decision document recommending approval of that rate. J.A. 151-54.

* After the pending decision was leaked to Peabody, the company hired Stanley Hulett, a close personal friend of Secretary Hodel, to seek the Secretary's assistance in the appeal. Shortly after an *ex parte* meeting with Mr. Hulett, the Secretary signed a memorandum prepared by Peabody instructing the Commissioner not to issue the decision approving the 20% rate. J.A. 157, 162-63.

* The Department sent the Tribe a letter in August, 1985, informing it that a decision had not been finalized in the appeal, but declining to explain why. Unaware of the meeting between Secretary Hodel and Hulett, or of the additional studies supporting the 20% rate, the Navajo assumed that the delay in approval was due to substantive concerns by the Department. In the face of a continuing loss of revenue caused by the still-controlling 1964 rate, the Navajo resumed negotiations with Peabody. J.A. 168-70.

* The Navajo eventually reached an agreement with Peabody that contained significant concessions. Among them were the following: a royalty rate of 12.5%, loss of the right to seek $89 million in back royalties and taxes, confirmation of existing tax waivers, and loss of the Secretarial review provision. J.A. 178-79.

* The Secretary approved the renegotiated lease despite numerous deficiencies in the review process. For example: A traditional economic analysis was not performed, J.A. 170, 175-76; the review found that the lease violated at least three regulations, J.A. 174; and the technical review was based on incomplete information and incorrect assumptions, J.A. 176-79.

Not surprisingly, both courts below concluded that the Government's conduct during this sequence of events fell far short of satisfying even the most basic standards of fiduciary care. As the Court of Federal Claims put it, "the Secretary . . . engaged in *ex parte* communications with private industry at the expense of the Navajo, the beneficiary of the trust relationship," then "approved lease amendments with royalty rates well below the rate that had previously been determined appropriate by those agencies responsible for monitoring the federal government's relations with Native Americans." *Navajo Nation*, 46 Fed. Cl. at 226-27. These actions "violated the most fundamental fiduciary duties of care, loyalty and candor." *Id.* at 227. The Federal Circuit concurred, concluding that "[i]t can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest." *Navajo Nation v. United States*, 263 F.3d 1325, 1328 (Fed. Cir. 2001).

SUMMARY OF ARGUMENT

1. The Government rests its argument on a flawed foundation by claiming that the plain language of the Tucker and Indian Tucker Acts requires dismissal of this claim. By its terms, the Indian Tucker Act authorizes suits against the Government involving (1) "any claim," (2) "in favor of any tribe," (3) "whenever" the claim "aris[es] under the Constitution, laws, or treaties of the United States, or Executive orders." 28 U.S.C. § 1505. That broad authorization applies to any and all claims premised on federal positive law (and even common law), and readily extends to the present action, which finds its basis in statutes and regulations governing Indian mineral leasing, the Government's established trust responsibility toward Indians, and the Government's treaty obligations to the Navajo Nation.

History confirms that Congress intended the courts to honor the broad language of the Indian Tucker Act and specifically to apply it to breach-of-trust claims. The Act replaced an awkward and archaic system for bringing claims against the Government, one that forced Tribes to obtain authorization for suit through special jurisdictional acts on a claim-by-claim basis. As enacted, moreover, the Act cautioned that it should not be construed as altering "the fiduciary or other relations" between the United States and Indian Tribes, 60 Stat. 1049 (1946), and Congress determined that facilitating enforcement of the Government's trust responsibilities was an essential function of the Act. *See* H.R. Rep. No. 1466, at 5 (1945).

2. The Government fares no better under this Court's precedents, which light the path for this claim. In *United States v. Mitchell*, 463 U.S. 206, 218 (1983) ("*Mitchell II*"), the Court confirmed that the broad language of the Indian Tucker Act waives the United States' sovereign immunity and does so for breach-of-trust claims. The strict construction that

applies to claimed waivers of sovereign immunity therefore plays no role in this case. The Court need only fairly interpret the cited laws, statutes and regulations to determine whether they establish an actionable trust relationship. *See United States v. Testan*, 424 U.S. 392, 400 (1976).

3. The statutory and regulatory provisions that govern the mineral lease at issue satisfy the tests set forth in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *Mitchell II* for identifying the existence of a fiduciary relationship. First, the Indian mineral leasing framework itself "directly supports the existence of a fiduciary relationship," *Mitchell II*, 463 U.S. at 224, as the core purpose of that framework—evidenced by the statutes, regulations, and legislative history—is to protect Indian resources and to ensure Indians "the greatest return on their property," S. Rep. No. 985, at 2 (1937). Second, the Secretary's comprehensive authority over all aspects of mineral leasing amply demonstrates the kind of "control or supervision" that gives rise to trust duties under *Mitchell II*. 463 U.S. at 225.

Once it is established that the applicable statutes and regulations create a fiduciary relationship under IMLA, the general law of trusts informs the content of the attendant duties. The Government's contrary assertion that the statutes and regulations themselves must enumerate each and every fiduciary duty that applies has no foundation in precedent, to say nothing of common sense. In this case, moreover, there is no need to establish the outer boundaries of the Secretary's trust duties, as the conduct here—involving not just failure to act in the Navajo's interests, but affirmative action contrary to those interests—is inconsistent with even the most elementary fiduciary standards. A damages remedy under the Indian Tucker Act naturally follows from a breach of these trust duties—as *Mitchell II* itself establishes, 463 U.S. at 226, and as a wider body of Tucker Act precedent (*e.g.*, contract and takings claims) confirms.

4. The Navajo's claim is reinforced by nearly two centuries of precedent, which "establish[es] that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987). This underlying trust relationship lends context to and illuminates the *Mitchell II* "control or supervision" test. For when the Government controls or supervises Indian property, it operates at the core of this historical trust relationship, and this Court has appropriately recognized that the Government is required to carry out its responsibilities in a manner befitting a trustee.

ARGUMENT

It does not take a law degree to appreciate that a most fundamental breach of trust occurred in this case. It does not take much common sense to reach the same conclusion. And it cannot be doubted that most Americans—and certainly anyone who has ever negotiated a contract—would recoil at the sequence of events that occurred here.

What, then, is it about the law and a well-developed common sense that, in the eyes of the Federal Government, makes this case anything but an easy affirmance? According to the Government, the plain language of the Indian Tucker Act and this Court's precedents defeat the Navajo's claim as a matter of law. Yet that is not true. The most observant attention to the terms of the Indian Tucker Act and the most ardent respect for *stare decisis* fully support the Navajo's breach-of-trust claim. And the check of common sense does no less. The Court should affirm.

I. CONTRARY TO THE GOVERNMENT'S POSITION, THE PLAIN TERMS OF THE INDIAN TUCKER ACT DO NOT DEFEAT THIS CAUSE OF ACTION.

In arguing that the Navajo should be denied their day in court, the Government initially makes a series of plain-language arguments. It thus contends that the Tribe's claim "conflict[s] with . . . the terms of the Tucker Acts," (U.S. 20) and that a reversal "is compelled by the text of the Tucker Act." *Id.* 46. It then adds that "the court of appeals' reasoning contradicts the terms of the Tucker Act"(*id.* 17) and cannot "be squared with the explicit jurisdictional requirements of the Tucker Act." *Id.* 29. Through it all, the Government repeatedly invokes the language of the Tucker Act to point out that the Tribe's claim "must be squarely grounded on an 'Act of Congress' or 'regulation of an executive department.'" *Id.* 29, 46, 47 (quoting 28 U.S.C. § 1491(a)).

But this drumbeat of textual criticism not only fails under the language of the Tucker Act itself but, importantly, cannot be squared with the text and history of the statute most directly implicated by this case—the Indian Tucker Act. Indeed, conspicuously missing from the Government's brief is any meaningful discussion of the language and history of that Act. As it turns out, whether one considers the literal meaning of the terms of that Act or looks to the circumstances that prompted its passage, there is nothing in the Act that defeats this cause of action. The Government's efforts to dispose of this case on "plain language" grounds should be swiftly rejected.

According to the Indian Tucker Act:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. §1505.

One can scarcely imagine broader language. The statute extends to (1) "any claim" against the United States, (2) "in favor of any tribe," (3) "whenever" the claim "aris[es] under the Constitution, laws, or treaties of the United States, or Executive orders." 28 U.S.C. § 1505. The waiver of immunity thus applies to any and all claims premised on federal positive law, to say nothing of federal common law. *Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522-23 (1992) (construing federal statute preempting state "law" as applying to state common law); *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 99 (1972) (construing "laws" in 28 U.S.C. § 1331 to include federal common law). Not only does this language establish a broad grant of power to bring claims against the United States, but it also is markedly broader than the terms of the Tucker Act itself. The Indian Tucker Act specifically mentions claims under "treaties" and "Executive orders"; it specifically refers to "laws" rather than Acts of Congress; and on top of these specifics it sweeps in claims that "otherwise would be cognizable in the Court of Federal Claims" under the Tucker Act. *Cf.* 28 U.S.C. § 1491(a). Unless the additional language is mere sound and surplusage, the Indian Tucker Act surely extends even further than the Tucker Act—at least to the extent plain language, as the United States suggests (U.S. 17), is the proper guide.

The historical circumstances that prompted passage of the Indian Tucker Act confirm that Congress meant what it said and evidence its clear understanding that the Act would apply

to trust-obligation claims. In enacting the law, Congress legislated against the backdrop of a ruthlessly inefficient system for obtaining relief, one that historically had been viewed as excluding Tribes from proceeding under the Tucker Act and had thus forced Tribes to obtain special congressional authorization to gain relief from the Government. Inefficient though it was, this claim-by-claim method of authorization was frequently invoked by the Tribes to enforce the Government's trust obligations to them. *See, e.g.*, *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944).

In an effort to minimize these inefficiencies and to end the unfairness that flowed from this form of claim authorization, the Indian Tucker Act created a permanent vehicle for Tribes to enforce the Government's obligations—including trust obligations. As passed, the Act made clear that "[n]othing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian Tribes, bands or groups," 60 Stat. 1049 (1946), a provision omitted in a later codification as surplusage, *see* U.S. Code, Titles 18 and 28-Amendments, ch. 139, § 89(a), 63 Stat. 102 (1949). Clearly, then, while the Indian Tucker Act may have given the Tribes the "same rights and remedies" as non-Indians (U.S. 22), it did not limit them to those rights. Recognizing that trust duties without violation-of-trust remedies undermined the animating objectives of the trust relationship between the Tribes and the Nation, Congress determined that facilitating enforcement of the Government's trust responsibilities to Tribes was an essential function of the Act. *See* H.R. Rep. No. 1466, at 5 (1945) ("If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.")

In facilitating this transition from a retail to a wholesale system of claim authorization, the Indian Tucker Act brought to an end a regime in which permission to sue one branch of the Federal Government remained a claim-by-claim prerogative of another branch of the Government. At the same time, the Act ended a regime in which Tribes had few assurances that Congress would permit their claim, no matter how egregious the violation of federal law was. The Tribe's claim in this case stems from precisely the type of breach of trust that Congress intended to address—and permit—under the Act.

Notwithstanding all of this, the Government argues (U.S. 26) that there is a "fatal jurisdictional defect" in the Navajo's claim, namely that it does not arise from a cognizable source of law recognized by the Indian Tucker Act. Not so. The Navajo's claim arises from at least three "laws" and two "treaties" that literally fall within the Act's scope and that were breached in this instance: (1) the Indian Mining Leasing Act ("IMLA"); (2) the IMLA regulations; (3) the common-law Indian trust doctrine; and (4) the 1849 and 1868 Treaties between the United States and the Navajo. Whatever else the United States' position rests upon, it assuredly does *not* rest upon the plain language of the Indian Tucker Act.

II. PRECEDENT CONFIRMS THAT A CAUSE OF ACTION FOR BREACH OF TRUST EXISTS IN THIS CASE.

The United States fares no better in seeking refuge in this Court's precedents. As the bookend requirements of *Mitchell I* and *Mitchell II* establish, breach-of-trust claims like this one have indeed been authorized by Congress and by this Court under both the Tucker and Indian Tucker Acts.

A. Customary Principles Of Statutory Construction, Not Strict Construction, Determine Whether The Navajo Have A Cognizable Cause Of Action.

The *Mitchell* decisions set the initial terms of debate. And contrary to the Government's repeated suggestions (U.S. 16, 21, 24, 49), that debate does not center on, or even involve, the question whether a waiver of sovereign immunity has occurred with respect to tribal breach-of-trust claims.

Mitchell II gives force to what the terms of the Indian Tucker Act so plainly say. Namely, the Act waives the United States' sovereign immunity from applicable suits at law and related suits at equity, and does so with respect to breach-of-trust claims. *Mitchell II,* 463 U.S. at 219. That means the only question at issue in this case is whether a breach-of-trust action exists under the applicable law and whether a breach of trust in fact occurred. The strict construction that greets claimed waivers of sovereign immunity plays no role in this "analytically distinct" inquiry. *Id.* at 218. *Cf. Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional.").

Nor at any rate would it be appropriate to add this second impediment to a tribal claim. Having cleared the high hurdle for obtaining a waiver of immunity in the first instance, the Navajo were not required to clear yet another hurdle before they could have their day in court. No such double presumption against a cause of action exists. To the contrary: "'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'" *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quotation omitted). Once immunity has been waived, the Court has put Congress and the Executive Branch on notice that it will not act as "a self-

constituted guardian of the Treasury" and thereby "import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

More than just common sense and tradition support this truth; logic does so as well. If the Government were correct that the same degree of clarity must appear in the law that creates the cause of action as in the law that generally waives the Sovereign's immunity from suit, the general waiver would be superfluous. Why broadly waive a government's immunity from suit if the surrender only applies to statutes that otherwise contain an ample waiver?

Accordingly, in assessing whether a breach-of-trust action exists in this instance, the Court need only fairly interpret the cited laws, statutes and regulations. *See Testan*, 424 U.S. at 400. The Government is not entitled to an additional thumb on the scales. Indeed, if any presumptions exist at this stage in the case, they run in favor of the Navajo Nation, *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

B. The Government Has Extensive Trust Duties With Regard To Indian Mineral Leases.

A fair, even-handed reading of the applicable laws establishes that the Navajo's breach of trust claim is firmly grounded in the statutory and regulatory framework for mineral leasing on Indian lands. As this Court has recognized, these kinds of applicable laws may be relevant both to "establish a fiduciary relationship" and to "define the contours of the United States' fiduciary responsibilities." *Mitchell II,* 463 U.S. at 224. In other words, the statutes and regulations shed light both on the nature of the Government's substantive responsibilities and on whether the Government must act as a trustee in undertaking them.

A Tribe may demonstrate trust duties in at least two distinct ways: (1) by identifying statutes, regulations, or

treaties that "directly support the existence of a fiduciary relationship," *Mitchell II*, 463 U.S. at 224, or (2) by establishing that the Government exercises "control or supervision over tribal monies or properties," *Id.* at 225 (quoting *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). The Navajo have satisfied both criteria here.

First, as discussed in greater detail in the Navajo Nation's brief, there are numerous affirmative indications that both Congress and the Secretary have created and recognized trust duties in the mineral leasing context. The text of IMLA requires Secretarial approval of all leases, 25 U.S.C. § 396a, and directs the Secretary to reject a lease bid if it is "unwise in the interest of the Indians" to accept it, 25 U.S.C. § 396b. The history of the statute demonstrates that these provisions were intended "to give the Indians the greatest return on their property," and emphasizes Congress' intent that the Secretary would have increased control over whether to approve mineral leases. S. Rep. No. 985, at 2 (1937). The 1985 regulations stress that this control is exercised in the "interests of the Indians". 25 C.F.R. § 211.3 (1985). And the current regulations confirm that the Department's role is to "maximize[] [the] best economic interests" of the Indian Tribes. 25 C.F.R. § 211.1 (2002).

In respecting these manifestations of congressional intent, the Court has noted that the uniform leasing procedures created by the IMLA were "designed to protect the Indians," *Montana v. Blackfeet Tribe*, 471 U.S. 759, 763-64 (1985), and that the "basic purpose" of the Act is "to maximize tribal revenues from reservation lands," *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985). In short, the language, history, and purposes of the statutory and regulatory provisions all establish the Government's fiduciary role.

Second, the extensive control and supervision exercised by the Government over mineral leasing on Indians lands

establishes actionable trust duties as well. Even apart from direct statutory and regulatory manifestations of trust duty, the existence of a trust relationship "can be inferred from the nature of the transaction or activity." *Navajo Tribe v. United States*, 624 F.2d at 987. In particular, this Court has recognized that "'[w]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" *Mitchell II*, 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987). That is because when Congress authorizes the Government to exert supervision or control over Indian lands or property, it places the Government in a capacity that implicates both a central component of its unique relationship with the Indian people and a core role of private trustees. Thus "it cannot be said that the Congress [is] merely 'regulating' Indian affairs, as it does many other facets of our national life." *Mitchell v. United States*, 664 F.2d 265, 273 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983). Rather, if the relied-upon statutory or regulatory provisions set forth Government responsibilities in a context involving Government "control or supervision" of Indian money or property, *Mitchell II*, 463 U.S. at 224, it is presumed, absent contrary evidence, that Congress intended that the responsibilities set forth by statute be carried out in the role of trustee.

Mitchell I and *Mitchell II* applied these principles and illustrate how they should work here. In *Mitchell I*, the Court concluded that, by itself, the General Allotment Act failed to establish that the Government had a fiduciary duty with respect to timber management on allotted reservation land. This conclusion was reached on the basis of clear affirmative evidence that Congress specifically intended to limit the

Government's control and supervision of allotted land. Under the Act, "the Indian allottee, and not a representative of the United States, is responsible for using the land . . ." 445 U.S. at 542-43. Likewise, the legislative history "plainly indicate[d]" that the trust was of limited scope. *Id.* at 543. The drafting history pointed in the same direction: It made "plain" that the Government intended that the land be held in trust for the limited purposes of preventing alienation and of ensuring immunity from state taxation. *Id.* at 543-44.

In *Mitchell II*, by contrast, the Court held that "control or supervision" over timber management on allotted lands was demonstrated by other statutes. Having found "control or supervision," the Court concluded that the Government's role with regard to Indian timber demonstrated "all of the necessary elements of a common-law trust." 463 U.S. at 225.

Measured by the same "control or supervision" test, the Navajo's claim clearly passes. From start to finish, the Secretary exercises extensive control and supervision over mineral leasing on Indian lands. 25 U.S.C. §§ 396, 396a, 399. The Secretary decides whether Tribes may negotiate a lease and imposes strict constraints on the length of the negotiations. 25 C.F.R. § 211.2 (1985). The Secretary has the right to force bidding of a lease even where the Tribe has already completed negotiations. *Id.* And no negotiated lease is valid unless the Secretary has reviewed and approved it. 25 U.S.C. § 396a; 25 C.F.R. § 211.2 (1985). In point of fact, the Secretary's authority over leases exceeds that of the Indians themselves in many respects. *See, e.g.*, 25 C.F.R. § 211.27(a) (Secretary has authority to cancel or rescind a lease for breach without Tribe approval); *NRG Co. v. United States*, 24 Cl. Ct. 51, 56 (1991) (Secretary has authority to permit lease assignments and to cancel lease development permits without tribal consent).

Once the Government approves a lease, its control becomes even more complete. Among other things, the Government controls whether and when operations begin, 25 C.F.R. § 211.2 (1985), lease duration, 25 C.F.R. § 211.10 (1985), lease assignment, 25 C.F.R. § 211.26 (1985), lease fees and inspections, 25 C.F.R. §§ 211.18, 211.25 (1985), and suspension of lease operations and surrender of the leased property, 25 C.F.R. §§ 211.14a, 211.24 (1985). In the face of these regulatory truths, the Court has recognized that the IMLA is indeed "comprehensive legislation." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 763 (1985).

Nor does it change things that the Tribes as well as the Government have a role to play in the initial leasing decision. Under any sensible understanding of "control or supervision," it cannot be an all-or-nothing concept. *Cf. Mitchell II*, 463 U.S. at 223 (finding "control" over grants of right-of-way on Indian lands even while acknowledging that the Secretary's power to grant rights-of-way was conditioned on "the consent of the tribal or individual Indian landowner"). To find a lack of any Government fiduciary responsibility in this case simply because the Tribes are not utterly deprived of control would mean that any incremental gain in Tribal power would come at the cost of absolving the Government of its fiduciary duties with respect to the authority it retains. The law does not put Congress to such a choice.

Properly framed, the question is whether the Government exercises "control or supervision" over Indian land or property with respect to the conduct as to which a breach is claimed. Control or supervision over timber management was necessary in the *Mitchell* litigation because that was the subject of the claimed breach. In this instance, the conduct at issue is the Government's review and approval of a mineral lease. The Government's complete veto power over Indian mineral leases in itself qualifies as control or supervision over this process. The Government, accordingly, must be presumed to act in a

fiduciary capacity when it decides whether or not to approve a mineral lease. This, of course, does not mean that the Secretary invariably must "substitute her own judgment for that of the Indian mineral owner." U.S. 39. It does mean, however, that the approval decision should attend to Indian interests and be undertaken in a manner that respects and honors the Government's fiduciary duties.

C. The Government's Actions Here Violate Even The Most Minimal Fiduciary Standards.

Once it is established that the applicable statutes and regulations give rise to trust duties with regard to the Secretary's review and approval of mineral leases, the general law of trusts provides the appropriate framework for supplying content to those duties. Time and again, the Court has looked to private trust law in assessing the Government's duties to Indian Tribes. *See, e.g., Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 14 (2001); *United States v. Dann*, 470 U.S. 39, 48-49 (1985); *United States v. Mason*, 412 U.S. 391, 398 (1973). Indeed, the Court has suggested that the Government's obligations toward the Tribes are, if anything, even more stringent than the duties of private trustees. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the Government is subject to the "most exacting fiduciary standards").

In spite of these precedents and the common-sense principles that inform them, the Government argues (U.S. 28) that it does not suffice simply to demonstrate the existence of a trust relationship. Rather, it adds (*id.*), the applicable statutes and regulations must enumerate each and every fiduciary duty that applies to the Government. Besides being unsupported by precedent, this innovation would impose an enormous drafting burden on Congress, to say nothing of uncommon foresight. In this instance, for example, it is doubtful that it would have occurred to even the most

experienced legislators that they should itemize the Secretary's duty not to pull the rug out from under the Tribe's effort to obtain a favorable rate. Neither is the Government's position consistent with normal principles of statutory construction, which presume that Congress legislates against the backdrop of common law and intends statutes to be read in light of it. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (Congress acts in light of accumulated meaning when establishing a trust); *Navajo Tribe,* 624 F.2d at 988 (court is not "required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute"); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) (deeming Government's position that statute "must spell out specifically all the trust duties of the Government" "certainly unnecessary for Indian property with its long and established history").

In this case, the Government's conduct failed to satisfy the most elementary fiduciary duties. First, notwithstanding the fact that the 20% royalty rate was supported by all of the Government's studies, Secretary Hodel placed a hold on the decision affirming that rate in direct response to lobbying by a close personal friend hired as Peabody's representative. The Department then stonewalled the Tribe in the face of repeated requests for information on the status of the appeal and the reasons for delaying a decision. Faced with a continuing loss of income due to the delay, and understandably interpreting the delay as related to substantive concerns with the rate, the Tribe returned to the bargaining table. The Tribe re-entered these "negotiations" at a marked disadvantage, since Peabody (but not the Tribe) knew that the Secretary had placed the appeal on indefinite hold at Peabody's request. The Secretary then approved the lease reached by these imbalanced negotiations a lease that ultimately contained significant concessions to Peabody, not least of which was the new rate. Moreover, the Secretary approved the lease without the

normal economic analysis and on the basis of an incomplete review.

As both the Court of Federal Claims and the Federal Circuit recognized, *Navajo Nation*, 263 F.3d at 1332 (quoting 46 Fed. Cl. at 227), this kind of conduct does not comport with basic fiduciary requirements of loyalty, care, and candor. *See, e.g.*, Restatement (Second) of Trusts §§ 170, 173, 174. By any standard, a trustee has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." Restatement (Second) of Trusts § 173 cmt. d. As the Court of Federal Claims noted, "[t]here is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." *Navajo Nation*, 46 Fed. Cl. at 226.

Under these circumstances, this case does not even require the Court to articulate the precise nature and scope of the fiduciary standards applicable to the Government's review and approval of the Navajo lease. For the Government's conduct violated bedrock fiduciary duties, no matter how narrowly or broadly defined. The Government did not merely fail to act loyally in serving the Indians' interests; it affirmatively undermined them. The Government did not merely fail to maintain candor with the Navajo; it affirmatively misled them. The Government did not merely approve a lease with economically unfair terms; it did so without engaging in its normal review process and with knowledge that the Navajo had negotiated the lease based on incomplete information. If the Government's control over Indian mineral leasing is subject to any fiduciary standard whatever—even a mere duty

of impartiality—this conduct falls considerably, and disappointingly, short of meeting it.

D. A Damages Remedy Is Available For Breach Of Trust Claims.

Once the Navajo establish a breach of trust by the Government, a damages remedy under the Indian Tucker Act invariably follows. "Given the existence of a trust relationship," *Mitchell II* makes clear, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." 463 U.S. at 226. The Government's repeated suggestion that some reference to money damages must appear in the applicable statutes, (U.S. 26, 29, 31), simply contradicts *Mitchell II*.

Nor is *Mitchell II* alone in this respect. Not only does the decision rest upon a long-established tradition of requiring trustees to pay money damages for fiduciary breaches, *see, e.g.*, Restatement (Second) of Trusts §§ 205-212 (1959); 3 Scott on Trusts § 205 (4th ed. 1988), and an equivalent practice under earlier Indian jurisdictional statutes, *see supra* at 9-10, it also builds upon a wider body of precedent. Outside the tribal context, Tucker Act decisions have not required an express provision for money damages in order to find that such damages were available. Rather, the substantive source of law may grant the claimant a right to recover damages either "expressly or by implication." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (quoted in *Mitchell II*, 463 U.S. at 217 n.16). The relevant analysis asks whether the source of substantive law relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage[s] sustained." *United States v. Testan*, 424 U.S. 392, 400 (1976) (quotation omitted). In undertaking this assessment, proper consideration is given to "the text of the section . . . its context, legislative

background, [and] past-enactment history." *Eastport*, 372 F.2d at 1011.

That an express statutory authorization of damages claims is not required is illustrated by three of the most well-established aspects of Tucker Act jurisdiction: contract claims, takings claims, and claims for refund of money improperly exacted. The Court for example has never held that a contract with the Government must explicitly authorize monetary relief in order to obtain the normal remedies for breach. *See United States v. Winstar Corp.*, 518 U.S. 839, 885-86 (1996) (Souter, J. concurring) ("most Government contractors would be quite surprised by the dissent's conclusion that, where they have failed to require an express provision that damages will be available for breach, that remedy must be 'implied in law' and therefore unavailable under the Tucker Act"). And although the Fifth Amendment does not provide an express cause of action for damages caused by a taking, this Court has long recognized that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine." *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 12 (1990) (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946)).

Similarly, even absent an express provision for them, actions for reimbursement of money improperly exacted under a statute likewise are "founded upon an act of Congress." *See, e.g., Clapp v. United States*, 117 F. Supp. 576 (1954) (explaining basis for such claims); *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (noting that the denial of such an action would "rest[] on the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye"). These cases properly recognize that to require the statute itself to provide for damages "would allow recovery only in cases where laws

other than the Tucker Act already created a right of recovery." *Clapp*, at 580 (quotation omitted).

In the end, history, practice and general principles of trust law confirm what *Mitchell II* makes clear. "[T]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.

E. The Government's Foundational Trust Responsibility To Indian Tribes Reinforces The Navajo's Claims.

Each of these conclusions is reinforced by "the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. Just as that relationship informed and supported the Tribe's claims in *Mitchell II*, so it does here.

For nearly two centuries, it has been "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *see also, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856). This predominant feature of the relationship between the Federal Government and the Indian Tribes stems from the most basic of sovereign acts—a realpolitik decision by the Tribes to cede title to their territory through treaties to the Federal Government in return for protection of that territory and the Tribes by the Government. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). The 1849 Treaty between the Navajo and the United States illustrates this. In return for the sovereignty-infringing promise to be "placed under the exclusive jurisdiction and protection of" the Federal Government, the Navajo were assured that they could "[r]ely[] confidently on the justice and

liberality" of the Government. 1849 Treaty, 9 Stat. 974, §§ I, IX; *see also*, 1868 Treaty, 15 Stat. 667.

In keeping with these foundations, the trust relationship, while serving as a source of federal authority, has at the same time placed a critical limit on that authority. *See, e.g., United States v. Sioux Nation*, 448 U.S. at 421 (trust relationship allows federal action with regard to Indian land without takings analysis but only if action geared to "protecting and advancing the tribe"); *Board of County Commissioners v. Seber*, 318 U.S. 705, 715 (1943) ("the United States assumed the duty of furnishing [] protection, and with it the authority. . ."). In fact, the Court has described the trust relationship as requiring governmental compliance with the "most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

This trust responsibility serves numerous objectives. First, it sets an overarching check on congressional action in the field of Indian affairs. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977) (legislation must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"). Second, it informs federal legislation that is enacted, providing a background principle that guides the interpretation of federal statutes that do, or may, impact tribes. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). Finally, it establishes general duties of the Federal Government with respect to tribal land separate and apart from the express provisions of a treaty, statute, executive order or regulation. *See, e.g., Lane v. Pueblo of Santa Rosa* 249 U.S. 110, 113 (1919) (using trust relationship as basis to enjoin the

Secretary's proposed disposal of tribal lands despite lack of claimed violation of any treaty or statute).

Properly understood, then, the federal trust relationship underpins all actions of the Federal Government relating to Indian interests. It works as both a promise by the Federal Government about its conduct toward Indians and as a measure of that conduct. In the last analysis, the trust relationship ensures that the Government's actions toward Indians correspond to the "overriding duty of our Federal Government to deal fairly with Indians wherever located," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

In this case, the trust relationship illuminates and lends context to *Mitchell II*'s "control or supervision" test. When the Government controls or supervises Indian land or property, it of course is acting in a capacity that is at the heart of its historical trust relationship with the Indians and that parallels roles frequently served by private trustees. It thus is particularly appropriate to presume that Congress intends the Government to carry out its statutory responsibilities in a manner befitting the underlying trust relationship.

III. THE GOVERNMENT'S REMAINING ARGUMENTS ARE UNPERSUASIVE.

A. The Court's Private Right Of Action Cases Shed Little Light On The Proper Indian Tucker Act Inquiry.

The Government suggests (U.S. 24) that the Court's decisions concerning implied private rights of action inform the inquiry here. That is mistaken. Those cases and the concerns that underlie them have little bearing on this action.

As an initial matter, the Court has never looked to its private right of action cases to determine whether a cause of action exists in this setting. *Cf. Timpangos Tribe v. Conway*, 286 F.3d 1195, 1204 (10th Cir. 2002) ("[T]he legion of cases

in which tribes have sued to enforce Indian rights . . . have proceeded without undertaking [the private right of action] analysis."). In view of the unique context of the Tucker Act and Indian Tucker Act, the Court has properly tailored the inquiry to this setting—which is to say, it has asked whether the statute at issue "'can fairly be interpreted as mandating compensation . . . .'" *Testan*, 424 U.S. at 400 (quoting *Eastport*, 372 F.2d at 1008-09).

No less importantly, Tucker Act and Indian Tucker Act cases involve a federal statute specifically authorizing suits to enforce the obligations of the Federal Government itself. As such, they do not implicate many of the concerns that animate the Court's private right of action decisions. Federalism concerns, for example, are one of the guideposts in the private right of action analysis because those cases generally involve suits against state officials and because the Court presumes that Congress would not casually disrupt the constitutional balance between the States and the Federal Government. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). That concern does not apply here, however. Unlike parties seeking to collect money from a State (or state official) under a statute enacted by the Federal Government, Indian Tucker Act plaintiffs seek to enforce obligations against the Federal Government that the Federal Government itself has created.

For like reasons, *Bivens*-action cases do not offer a useful parallel. While they involve suits against federal rather than state actors, they deal with the unusual situation in which the Court acts in a common-law-type capacity to infer full tort remedies against federal actors despite the complete absence of affirmative action by Congress either authorizing such suits or defining the scope of liability. The Court, as a result, has hesitated to extend *Bivens* remedies to new contexts in view of the significant separation-of-powers concerns implicated by

such claims. *See, e.g., Correctional Services Corp. v Malesko*, 122 S. Ct. 515, 521 (2001). Indeed, because *Bivens* actions are grounded in the Constitution, and because Congress may not respond by amendment as it may where the claim derives from a statute, those separation-of-powers concerns are particularly acute. *See id.*, 122 S. Ct. at 524 (Scalia, J. concurring). No such problem arises with Tucker Act and Indian Tucker Act cases. They stem from a specific jurisdictional statute and arise out of obligations assumed by Congress.

In addition to these fundamental differences between Indian Tucker Act cases and private right of action cases, the nature of claims to enforce the Federal Government's obligations to Indians also make the analogy inapt. The inquiry in cases claiming a private right of action under a specific statute begins with consideration of whether the statute focuses on "a class of beneficiaries." *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2276 (2002). But in Indian Tucker Act cases pertaining to the Government's obligations regarding Indian lands and property, it is clear from the very nature of the relationship that Indians are the benefitted class.

Similarly, a core concern in the private right of action cases is whether Congress intended the rights at issue to be enforceable by the individuals they benefit or whether it intended enforcement by some other means. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 289 (2001); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 28. This same concern is important in *Bivens* cases as well, and is often critical to the decision whether to extend *Bivens* to a new context. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 489 (1988). In Indian Tucker Act cases, however, there is no concern that Congress may have intended enforcement by some other mechanism. In fact, the Indian Tucker Act was specifically passed to provide a means for ensuring accountability with respect to the Government's obligations to

the Tribes. *See* H.R. Rep. No. 1466, at 5 (1945) (the lack of redressability for most Indian claims "encourages bureaucratic disregard of the rights of Indian citizens . . . ."); 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson) ("let us see that the Indians have their fair day in court so that they can call various government agencies to account on the obligations that the Federal Government assumed.").

Further, the question whether a breach of trust action exists in the Indian Tucker Act context is inextricably linked to the historical trust relationship between Indians and the Federal Government and turns on whether the statute gives rise to trust duties in light of that relationship. These considerations, it is clear, play no role in private right of action cases.

In light of these differences between the two types of cases, the Court has not drawn a parallel between them—and notably did not do so in *Mitchell II* when the Federal Government relied on private right of action decisions to advance its position there. *See* Brief for United States at 21-22 No. 81-1748 (Sept. 3, 1982). Rather, the Court based its analysis on traditional Tucker-Act principles and the trust relationship between the Tribes and the United States. *Mitchell II*, 463 U.S. at 218, 225. The Government's continued reliance on the private right of action cases here is simply incompatible with *Mitchell II*.

B. The Government Cannot Avoid Damages Liability By Relegating The Tribe To APA Relief Or By Focusing on the Appeal Regulations.

The Government next argues (U.S. 37) that the Navajo should be limited to seeking declaratory or injunctive relief under the Administrative Procedure Act ("APA"). Such relief, however, is clearly insufficient to remedy the damages caused by the Secretary's violations in this case. As this Court recognized in *Mitchell II*, "prospective equitable remedies are

totally inadequate" to cure violations of the Department's duties in overseeing Indian lands. 463 U.S. at 227. "[B]y the time government mismanagement becomes apparent," the Court noted, "the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." *Id.* That concern is all the more true when the Government acts in a deliberately secretive way, as it did here, making the possibility of meaningful injunctive relief all but impossible.

Nor does it change matters that much of the Secretary's egregious conduct took place during the pendency of Peabody's appeal from the Department's decision to impose the 20% royalty rate. The Government suggests (U.S. 37) that no relief is available under the Tucker Act for that conduct because the regulations governing the appeal process do not mandate compensation for their breach. This narrow-minded conception of the Secretary's role is unsupported by the appeal regulations, and it fails to recognize the direct connection between the Secretary's actions in the appeal process and his later review and approval of the renegotiated lease.

As an initial matter, it is evident from the regulations governing appeals that, contrary to the Government's suggestions, the Department is required to protect Indian interests during that process. For example, these regulations require the Department to render assistance to Indians in the appeal process if requested, 25 C.F.R. § 2.10 (1985), to notify Indians of their right to appeal a decision, 25 C.F.R. § 2.4 (1985), and to require the posting of a bond to protect the interests of any Indians affected by an appeal, 25 C.F.R. § 2.3(b) (1985). At the same time, an appeal is available only to "correct" a decision by the Department where it conflicts with rights established by the Constitution, other federal laws or Departmental regulations. 25 C.F.R. § 2.2 (1985).

Thus, during the appeal, the Department does not assume the role of neutral arbiter. Indeed, it would make little sense

for the Department to make decisions in its fiduciary capacity concerning Tribal resources, then purport to review those decisions from a neutral perspective on appeal. Instead, the appeal is appropriately limited to determining whether a given decision directly violates some other law or regulation. These review responsibilities are consistent with, and in no way eliminate, the Government's duties toward the Tribe. *Cf. Nevada v. United States*, 463 U.S. 110, 128, 144 n.16 (1983); *id.* at 145 (Brennan, J., concurring).

Further, although these regulations clearly indicate that the Department acts in its fiduciary capacity when conducting an appeal, the Navajo's claim in this case looks far beyond the appeal procedures. In addition to the shortcomings in the appeal itself, the Secretary breached his fiduciary duties in ultimately approving the lease with full knowledge that the negotiations of that lease had been skewed in Peabody's favor by the Secretary's own actions. The Government's effort to focus on the earlier appeal process cannot alter the fact that the Secretary's approval of the renegotiated lease under these circumstances constituted a clear breach of trust that is remediable by money damages.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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October 2002

No. 01-1375

OCT 9 2002

CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

NAVAJO NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR *AMICUS CURIAE* MISSISSIPPI BAND OF CHOCTAW INDIANS IN SUPPORT OF THE NAVAJO NATION

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On Writ of Certiorari to the United States Court of Appeals For the Federal Circuit

BRIEF FOR *AMICUS CURIAE* MISSISSIPPI BAND OF CHOCTAW INDIANS

INTEREST OF *AMICUS CURIAE*

Amicus Mississippi Band of Choctaw Indians (the "Tribe") is a federally recognized Indian tribe located in the State of Mississippi. See *United States v. John*, 437 U.S. 634 (1978); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). The United States supervises the Tribe's trust assets including timber. The Tribe has a significant stake in the outcome of this case, which will address the issue of when the United States is liable for monetary damages for the mismanagement of tribal trust assets.*

* No counsel for a party authored this brief in whole or part and no person other than *amicus* made a monetary contribution to the preparation or submission of this brief, except that *amicus* Native American Rights Fund contracted for the research embodied in the Appendix.

ARGUMENT

The Government's Concern About Excessive Awards is Misplaced

In its petition for certiorari, the Government referred four times to the amount of the Tribe's claim for damages ($600 million)—once in the "Question Presented" (Br. page i), once in passing (Br. 9), once in the first sentence of the section "Reasons for Granting the Petition" (Br. 13), and once in the second sentence of the section "The Court of Appeals' Decision Could Have Serious Adverse Consequences for the Government" (Br. 27). And three more times in its 3-page Reply to the Opposition to Certiorari. Of course, the figure of $600 million is the amount claimed, not the amount that might be awarded in the event the case is permitted to go forward to trial in a court not noted for its generosity.

In its petition, the Government said,

> "The decision below will encourage the filing of damage claims against the United States for breach of trust . . . . At a minimum, such a development will subject the United States to costly litigation . . . ." (Br. 27).

That is not a legal argument, but in any event the Government's concern is misplaced. The decision below made no new law, and so we wondered what was the record of the Court of Federal Claims based on the old law (*i.e.* Mitchell II), in the 19 years since Mitchell II was decided. For the benefit of the Court, we arranged for an independent professional researcher to identify all Indian cases disposed of by the U.S. Court of Federal Claims under the Tucker Act (28 U.S.C. § 1491) or Indian Tucker Act (28 U.S.C. § 1505), where the disposition of the case took place after the Mitchell II decision in June, 1983. Cases brought under the Indian Claims Commission Act of 1946 (25 U.S.C. §§ 70-70v, now repealed), or other special acts, where the Mitchell II decision was unlikely to be relevant, were omitted.

The results of the study were striking. The researcher found 108 Indian claims under the Tucker Act or Indian Tucker Act that have been finally disposed of by that court since June 1983 (or are on appeal). See Appendix attached. Nearly two-thirds of these cases (71) were dismissed without award. Plaintiffs received damages awards in only 37 cases, and only 11 of those 37 were awarded more than $1 million. The other 26 awards averaged only $120,000.

The 11 awards greater than $1,000,000 are as follows:

	Filed	Final Order	Award
1. Jessie Short et al., a group of Yuroks claiming shares in the Hoopa Reservation timber income. (Basic liability decided prior to Mitchell)	1963	1993	$52,360,000
2. Helen Michell & Other Indian allottees and the Quinault Tribe—timber mismanagement (the Mitchell II plaintiffs)	1971	1989	$26,600,000
3. Warm Springs Tribe—timber mismanagement (now on appeal)	1960	2002	$13,805,605
4. Navajo Nation—trust funds	1969	2002	$7,000,000
5. Navajo Nation—trust funds	1983	1987	$6,000,000
6. Mescalero Apache—timber mismanagement	1992	2002	$6,000,000
7. Assiniboine/Sioux Tribes—trust funds	1987	1999	$4,438,770
8. Navajo Nation—coal royalties	1995	1997	$3,572,000
9. Toohey, Delra—oil & gas leases	1987	1990	$3,000,000
10. Mescalero Apache—timber mismanagement	1979	1984	$1,646,500
11. Cheyenne Arapaho—oil & gas leases	1987	1998	$1,100,000

For additional studies of how Indian tribes have fared in federal courts (including this Court), see Nell Jessup Newton, *Indian Claims in the Court of the Conqueror*, 41 Am. U. L. Rev. 753, 790 (1992) ("despite the promise of Mitchell II, Indian tribes have been remarkably unsuccessful in breach of trust claims in the Claims Court and the Federal Circuit"); Stephen Paul McSloy, *Revisiting the "Courts of the Conqueror"; American Indian Claims against the United States*, 41 Fed. Bar News & J. 552, 556 (1994) (from the Indian point of view "[t]he recent interpretations of the boundaries of the federal government's trust relationship and its consequent trust responsibilities under the Mitchell (II) standard have not been promising."); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 280-81 (2001) ("Tribal interests have lost about . . . 82% of the cases decided by the Supreme Court in the last ten years. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases.")

In Indian breach of trust cases under the Tucker Act or Indian Tucker Act, the basic issue is justice, and that means restoring the trust corpus if the Government's misconduct has imprudently depleted it. That is old law, Mitchell II, 463 U.S. at 227, which the Government has not suggested be overruled. As is apparent from the Appendix, the Government's fear that Mitchell II has led or will lead to a flood of excessive awards is not borne out by the facts.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Disposition (Final or Tentative) by the U.S. Court of Federal Claims, October 29, 1992 - August 23, And Its Predecessor Court, the U.S. Claims Court, June 27, 1983 - October 28, 1992, Of Suits Involving Identifiable Native American Entities and Individuals, Brought under Title 28 U.S.C. § 1491 (General Claims) or § 1505 (Indian Claims), Excepting Tax-Refund, Civilian-Pay, or Military-Pay Suits, or Claims for Attorneys' Fees, Arranged by Date of Entry by the Court of the Judgment or of the Voluntary Dismissal

[Defending Agency Assumed to be U.S. Department of the Interior Unless Otherwise Noted]

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September 5, 2002

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
07/26/83	82-484	Alamo Navajo School Board; Contract for Operation of School	Dismissed by Parties.	
09/19/83	82-686	Chinook; Taking of Hunting and Fishing Rights	Dismissed by Plaintiffs	
12/28/83	80-664	Cape Fox Corp. [USDA]; Compensation under Timber Sale Contract	Dismissed by Court, 4 Cl.Ct. 223, 12/27/83; Dismissed, Federal Circuit Mandate, 06/27/84.	
02/07/84	67-134	Menominee; Land Taking by Deed Restrictions	Mandated Dismissal, 726 F.2d 712, 12/30/83; Cert. Denied, 469 US 826, 10/01/84.	
02/28/84	67-134	Menominee; Management of Forest Resources	Mandated Dismissal, 726 F.2d 718, 01/24/84; Cert. Denied, 469 US 826, 10/01/84.	
04/10/84	70-343	Te-Moak Western Shoshone; Management of Judgment Funds	Dismissed by Court, 5 Cl.Ct. 79, 04/10/84.	
08/28/84	79-089	Mescalero Apache; Management of Tribal Timber Resources	Stipulated Settlement.	$1,646,500
09/11/84	84-010	Fort Mojave;	Stipulated Settlement.	$69,000
11/16/84	67-134	Menominee; Management of Mill, Power-Line Rights-of-Way, and Water and Sewage Facilities	Mandated Dismissal, Federal Circuit, 11/16/84.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
01/07/85	67-134	Menominee; Management of Tribal Funds	Dismissed by Court.	
03/14/85	81-500	Fort Belknap; Failure to Enter Lease Agreement	Dismissed by Court, 7 Cl.Ct. 601, 03/14/85.	
06/04/85	71-870	Hoopa Valley; Management of Properties	Dismissed by Parties.	
06/11/85	84-630	Manchester Pomo;	Stipulated Settlement.	$8,114 + Interest
12/10/85	84-597	Jones, Vera; Representation in Earlier Legal Proceeding	Dismissed by Court, 9 Cl.Ct. 292, 12/09/85; Affirmed, 801 F.2d 1334, 09/23/86; Cert. Denied, 481 US 1013, 04/20/87.	
12/30/85	85-521	Temple, Dorothy;	Dismissed by Court; Affirmed, 795 F.2d 1018, 06/12/86.	
02/25/86	82-582	LaMear, Jennie; Approval of Land Exchange	Dismissed by Court, 9 Cl.Ct. 562, 02/25/86; Affirmed, 809 F.2d 789, 11/17/86.	
10/02/86	85-221	Northern Cheyenne; Maintenance and Repair of School	Dismissed by Parties.	
11/04/86	85-053	Pawnee, Freeman; Method of Valuing Oil and Gas Sold	Dismissed by Court; Affirmed, 830 F.2d 187, 09/28/87; Cert. Denied, 486 US 1032, 05/31/88.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
01/13/87	69-256 70-377	Navajo; Management of Trust-Fund Accounts	Stipulated Settlement.	$7,000,000
01/13/87	83-588	Navajo; Management of Reservation's Revenues	Stipulated Settlement.	$6,000,000
05/29/87	84-203	Northern Indian Housing [HUD]; Treatment of Paid Insurance Premiums	Dismissed by Court, 12 Cl.Ct. 417, 05/28/87.	
08/10/87	85-268 85-335	Begay, Joe; Hopi Relocation, Settlement Act of 1974	Dismissed by Court, 16 Cl.Ct. 107, 08/07/87; Affirmed, 865 F.2d 230, 12/05/88.	
11/27/87	87-490	Benally, Truman; "Bad Man" Clause in Treaty	Dismissed by Court, 14 Cl.Ct. 8, 11/25/87.	
04/15/88	86-059	Totus, Watson;	Dismissed by Court.	
08/30/88	87-405	Chippewa-Cree;	Dismissed by Court.	
08/30/88	87-626	Billy, Melvin;	Dismissed by Court.	
09/26/88	86-557	Hopland Pomo; Termination of Rancheria and of Tribe	Mandated Dismissal, 855 F.2d 1573, 08/30/88.	
10/27/88	82-035	Tule River; Management of Trust Funds and Timber	Dismissed by Parties.	
12/05/88	87-436	Vielle, Leon;	Dismissed by Parties.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
12/23/88	87-071	Eastern Cherokee; Funding of Tribe's School	Dismissed by Court, 16 Cl.Ct. 75, 12/23/88.	
08/29/89	71-772- 71-775	Mitchell, Helen and Other Quinault Allottees; Management of Logging Contracts and Land Matters	Stipulated Settlement.	$26,600,000
10/18/89	84-518	Tsosie, Venita; "Bad Man" Clause in Treaty	Stipulated Settlement.	$16,500
10/31/89	88-330	Ute	Dismissed by Court.	
01/12/90	87-752	Enos, Frank.;	Stipulated Settlement.	$39,139
03/05/90	86-805	Hosteen, Lewis;	Dismissed by Court.	
06/14/90	90-0037	Tunica-Biloxi; Taking of Tribal Lands, 1800-1840	Dismissed by Court; Affirmed, 935 F.2d 280, 05/17/91; Cert. Denied, 502 US 868, 10/07/91.	
06/15/90	87-422 87-429	Toohey, Delra; Management of Oil and Gas Leases	Stipulated Settlement	$3,000,000
06/29/90	87-437	Cochran, Lyle [Fort Belknap, 3rd-Party]; Taking of Gravel from Mineral Estate	Stipulated Settlement.	$50,000

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
08/09/90	84-588	Grey, Herman; Irrigation Water for Individual Allotments (Case Related to 89-205)	Dismissed by Court, 21 Cl.Ct. 285, 08/09/90; Affirmed, 935 F.2d 281,/05/24/91; Cert. Denied, 502 US 1057, 01/21/92.	
08/13/90	89-205	Abel, Carlton; Irrigation Water for Individual Allotments (Case Related to 84-588)	Dismissed by Court Following Decision in Grey, 08/09/90, Cited Above; Affirmed, 935 F.2d 281, 05/24/91; Cert. Denied, 502 US 1057, 01/21/92.	
11/07/90	88-031	Assiniboine and Sioux; Management of Tribal Oil and Gas Leases	Stipulated Settlement.	$137,737 + Interest
11/07/90	88-031	Youngbull, Iona; Management of Tribal Oil and Gas Leases	Dismissed by Individual Plaintiffs.	
12/07/90	89-418	Rosebud Sioux;	Dismissed by Parties.	
12/13/90	86-575	Navajo;	Stipulated Settlement.	$909,221.
02/28/91	75-010	Duncan, Mabel; Termination of Rancheria; Adequacy of Water and Sanitation Facilities	Stipulated Settlement; Recorded with Court Order, 22 Cl.Ct. 615, 91/02/28.	$70,000 + Housing
04/10/91	90-0093	Sankey, Madeline; Valuation of Oil and Gas Sold under Lease	Dismissed by Court, 22 Cl.Ct. 743, 04/09/91; Affirmed, 951 F.2d 1266, 12/11/91.	
04/15/91	90-3875	Cook Inlet Housing [HUD]; Contract Subsidy	Dismissed by Plaintiff.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
06/10/91	87-660	San Ildefonso;	Stipulated Settlement.	$299,500
08/22/91	90-0553	Catawba; Effects of Catawba Assets Distribution Act	Dismissed by Court, 24 Cl.Ct. 24, 08/20/91; Affirmed, 982 F.2d 1564, 01/06/93; Cert. Denied, 509 US 904, 06/21/93.	
08/30/91	89-191	Abel, Charles;	Dismissed by Court.	
02/28/92	85-735	Oglala Sioux; Management of Loan Assets	Stipulated Settlement.	$299,999
05/15/92	89-229	Salt River Pima-Maricopa; Management of Tribe's Water Resources	Dismissed by Court, 26 Cl.Ct. 201, 05/11/92.	
05/22/92	90-3897	Pottawatomi in Canada; Unpaid Treaty Annuities	Dismissed by Court; Reconsideration Denied, 27 Fed.Cl. 388, 12/14/92.	
06/25/92	92-0040	Gardner, Evelyn; Method of Valuing Oil and Gas Sold (Case Related to 85-053)	Dismissed by Court.	
07/15/92	92-0153	Sanders, Chief Silver; Taking of Lands in 19th and 20th Centuries	Dismissed by Court.	
09/15/92	87-020	Anderson, Florence;	Stipulated Settlement.	$149,758

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
07/29/93	63-102	Short, Jessie [Hoopa Valley, - Intervenor]; Share of Revenue from Timber Sales (Case Related to 78-460, 85-146, 85-746)	Judgment by Court; Affirmed, 50 F.3d 994, 03/14/95.	$52,360,000 + Interest
07/29/93	78-460	Ackley, Charlene [Hoopa Valley, Intv.]; Income from Resources on Unallotted Lands (Case Related to 63-102)	Judgment by Court; Affirmed, 50 F.3d 21, 03/22/95.	$153,000 + Interest
07/29/93	85-146	Aanstad, Brett [Hoopa Valley, -Intv.]; Income from Resources on Unallotted Lands (Case Related to 63-102)	Judgment by Court; Affirmed, 50 F.3d 21, 03/22/95.	$960 + Interest
07/29/93	85-746	Giffen, Norman [Hoopa Valley, -Intv.]; Income from Resources on Unallotted Lands (Case Related to 63-102)	Stipulated Settlement; Affirmed, 50 F.3d 21, 03/22/95.	$640 + Interest
08/09/93	92-0427	Ute Taking of Tribal Lands by 1849 Treaty	Dismissed by Court, 28 Fed. Cl. 768, 08/06/93.	
08/24/93	92-0783	Balzano, Jeane; Entitlement of Contingent Annuitant	Dismissed by Parties.	
11/03/93	91-1147	Tabbee, Lawanna; Relief from Ute Termination Act	Dismissed by Court Except for Tax Claim, 30 Fed.Cl. 1, 11/03/93.	
12/22/93	88-753	Fort McDowell Mohave-Apache;	Dismissed by Parties.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
01/19/94	90-3872	Penobscot;	Dismissed by Parties.	
09/16/94	89-169 89-170	Fort Mojave; Colorado River; Representation in Earlier Legal Proceeding	Dismissed by Court, 32 Fed.Cl. 29, 09/09/94; Affirmed, 64 F.3d 677, 08/18/95.	
09/16/94	94-0021	Wright, Venoia; Leasing and Permitting of Allotted Land	Dismissed by Court, 32 Fed.Cl. 54, 09/13/94; Appeal Dismissed, 48 F.3d 1235, 02/03/95.	
11/07/94	94-0026	Gosuk, Jack; Protection of Interests in Reindeer Herd	Dismissed by Parties.	
11/14/94	93-0338	Goombi, Dorla; Contamination of Drinking Water	Dismissed by Parties and Court.	
11/29/94	86-409	Crow;	Dismissed by Parties; Appeal Dismissed, 53 F.3d 347, 04/14/96.	
04/06/95	95-0270	Sherer, Rowa; Dissatisfaction with District Court Action	Dismissed by Court.	
05/10/95	93-199	Allred, Stuart [DHHS]; Termination of Indian Health Service Care	Dismissed by Court, 33 Fed.Cl. 349, 05/09/95; Appeal Dismissed, 78 F.3d 602, 01/30/96.	
07/14/95	92-0567	Flathead Joint Board; Management of Power Project	Dismissed by Parties.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
12/12/95	94-1051	Dakota Tribal Industries [GSA]; Desire to Reform Contract, Contract Disputes Act	Dismissed by Court, 34 Fed.Cl. 593, 12/05/95.	
05/31/96	92-0130	Seldovia Native Association; Availability of Land for Selection	Dismissed by Court, 35 Fed.Cl. 761, 05/30/96; Affirmed, 144 F.3d 769, 05/14/98.	
02/05/97	94-0449	Nambe; Actions in Leasing Restricted Lands	Stipulated Settlement.	$77,500
03/05/97	95-0449	Pit River; Taking of Gravel from Trust Property	Stipulated Settlement.	$20,000
10/15/97	95-0136	Navajo; Royalties on Coal Leases	Stipulated Settlement.	$3,572,000
10/31/97	96-0116	Herrera, Matthew; "Bad Man" Clause in Treaty,	Dismissed by Court, 39 Fed.Cl. 419, 10/31/97; Affirmed, 168 F.3d 1319, 08/06/98.	
12/10/97	96-0270	Davis, Presley; Management of Indian Money Account (Case Related to 97-0099)	Stipulated Settlement.	$40,000
12/10/97	96-0270	Davis, Wesley; Management of Indian Money Account *(Case Related to 97-0099)*	Stipulated Settlement.	$40,000

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
12/10/97	97-0099	Toledo, Lucy; Management of Indian Money Account (Case Consolidated with 96-0270)	Stipulated Settlement.	$45,000
04/30/98	87-247	Cheyenne-Arapaho; Management of Oil and Gas Leases	Stipulated Settlement.	$1,100,000
09/03/98	97-0033	Kanag'Iq Construction [DHHS]; Contract Costs, Contract Disputes Act	Stipulated Settlement	$25,000
09/30/98	84-320 84-321	Hopi; Land Damage from Trespassing Livestock (Case Related to 84-319)	Dismissed by Parties and Court Order.	
11/18/98	91-1650	Delgado, Shirley; Royalties on Oil and Gas Lease	Stipulated Settlement.	$100,000
01/12/99	87-773	Assiniboine and Sioux; Management of Trust-Fund Accounts	Stipulated Settlement.	$4,438,770 + Interest
02/09/99	91-1428	Utah Dineh Committee; Distribution of Mineral Royalties	Dismissed by Parties.	
03/15/99	91-0878	Huna Totem Corp. [USDA]; Sharing of Costs of Timber Transportation	Stipulated Settlement.	$225,000
04/15/99	77-112	Jicarilla Apache; Management of Oil and Gas Leases	Dismissed by Parties.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
08/07/99	90-3993 91-1432 92-0173	Karuk; Ammon, Carol; Yurok; [Hoopa Valley, -Intv., in Each]; Taking of Property Interests	Dismissed by Court, 41 Fed.Cl. 468, 08/06/98 (Summary Judgment to US and Hoopa Valley); Affirmed, 209 F.3d 1366, 04/18/00; Cert Denied, 532 US 941, 03/26/01.	
08/12/99	92-0099	Southern Ute; Protection of Interests in Extracted Coal-Bed Methane	Dismissed by Parties.	
11/19/99	99-0148	White Mountain Apache; Maintenance of Trust Property	Dismissed by Court, 46 Fed.Cl. 20, 11/19/99; Reversed and Remanded, 249 F.3d 1364, 08/29/01; Cert. Granted, 535 US __, 04/22/02.	
01/18/00	97-0804	Piquniq Management [AF]; Contract Costs, Contract Disputes Act	Dismissed by Parties.	
02/04/00	93-0763	Navajo; Management of Coal Lease	Dismissed by Court, 46 Fed..Cl. 217, 02/04/00; Reversed and Remanded, 263 F.3d 1325, 08/10/01; Cert. Granted, 535 US __, 06/03/02.	
03/07/00	84-319 89-651	Hopi, Livestock Trespass Penalties Due (Case Related to 84-320, 84-321)	Dismissed by Parties and Court Order.	
04/19/00	99-0456	Bay View, Inc. [Not Identifiable]; Alaska Native Corporation Revenues	Dismissed by Court, 46 Fed. Cl. 494, 04/19/00; Affirmed, 278 F.3d 1259, 12/03/01; Petition for Cert., 06/20/02.	

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
05/25/00	99-0145	Goombi, Dorla; "Bad Man" Clause in Treaty	Dismissed by Court.	
05/30/00	91-0898	Brown, Errol; Management of Leases on Allotments	Stipulated Settlement.	$189,693
01/17/01	82-388	Red Lake Chippewa; Management of Land, Timber, and Trust Funds	Dismissed by Parties and Court Order.	
04/03/01	88-699	Colorado River;	Stipulated Settlement.	$62,000
06/05/01	99-0996	Brown, David; Transfer of Real Estate and Lease Interests	Stipulated Settlement.	$55,000
10/10/01	92-0624	Santa Ana; Taking of Land and Minerals for Dam	Dismissed by Parties.	
01/08/02	99-0858	Flying Horse, Velia; Cancellation of Employment Contracts	Dismissed by Plaintiffs.	
01/14/02	00-0412	Olsen, Wilma; Transfer of Land Deed	Dismissed by Parties.	
01/30/02	92-0403	Mescalero Apache; Management of Forest Resources	Stipulated Settlement.	$6,000,000

ENTRY	CASE #	[AGENCY]; MATTER	DISPOSITION	AWARD
06/20/02	96-0269	Warm Springs; Management of Timber Resources	Judgment by Court, Unpublished Decision, 06/20/02.	$13,805,607
07/18/02	96-0768	Kanag'Iq Construction [DHHS]; Contract Costs, Contract Disputes Act	Stipulated Settlement.	$34,000

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Copies of judgment orders issued by the Clerk of Court, October 1, 2001-August 23, 2002.

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Shepard's Citations, accessed electronically through Lexis-Nexis.

For any case identified as having potential for this table, the paper docket (such dockets stop in mid-1993), kept by the Office of the Clerk, U.S. Court of Federal Claims, and/or the electronic docket (for cases docketed prior to mid-1993 and having any activity subsequent to mid-1993, and for cases docketed subsequent to mid-1993), kept by the Office of the Clerk, U.S. Court of Federal Claims, in the U.S. Courts' PACER (Public Access to Electronic Records) system, accessed from the Internet website of the Court of Federal Claims, <http://uscfc.uscourts.gov>.

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Also, the generous assistance and counsel of deputy clerks in the Office of the Clerk, U.S. Court of Federal Claims, and of librarians in the library for the U.S. Federal Circuit Court of Appeals and the Court of Federal Claims.

Supreme Court, U.S.
FILED
OCT 9 2002
CLERK

(9)

No. 01-1375

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT THE NAVAJO NATION

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BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE NATION AND THE PUEBLO OF LAGUNA IN SUPPORT OF RESPONDENT THE NAVAJO NATION

The Jicarilla Apache Nation ("Jicarilla") and the Pueblo of Laguna ("Laguna") respectfully submit this brief as *amici curiae* in support of the Navajo Nation. Both parties to this case have consented to the filing of this brief, as indicated in letters filed with the Court.[1]

INTEREST OF *AMICI*

The Jicarilla Apache Reservation is located in northwest New Mexico on the eastern edge of the San Juan Basin, which is the second largest gas field in the lower 48 states. Jicarilla is the lessor and royalty owner of over 100 oil and gas mining leases issued in the early 1950s under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g ("IMLA"). Jicarilla depends on royalties from its oil and gas leases to fund its operating budget, which is used to provide essential government services to its members and other residents: revenues (including taxes) from oil and gas production comprise about 90% of the tribe's operating budget, and are used for the police department, the tribal court, emergency services, and various community social services, including day care and care of the elderly, to list a few.

The Pueblo of Laguna, which comprises more than 500,000 acres of trust lands in west central New Mexico, is located in the Grants Mineral Belt, one of the world's largest uranium fields. Between 1953 and early

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici* made a monetary contribution to the preparation or submission of this brief.

1982, the Anaconda Company removed over 24 million tons of uranium ore from the Jackpile mine on the reservation, pursuant to leases approved by the Government under the IMLA. The Jackpile mine, a pit several hundred feet deep and covering several square miles, was the largest open pit uranium mine in the world when it was operating. The U.S. Atomic Energy Commission was the major purchaser of the uranium.[2]

As discussed below, the Department of the Interior ("Department") was and is responsible for approving these leases and administering them in virtually every aspect, including ensuring that the correct amount of royalties is paid to the tribes for their minerals. The Government's proper management of and accounting for the tribes' resources is of the utmost importance to the tribes and to their efforts to provide services and economic opportunity to their members. *Amici* therefore have a vital interest in ensuring that the Government carries out its trust responsibilities under the IMLA and other mineral leasing laws.

SUMMARY OF ARGUMENT

Under the IMLA and associated statutes and regulations, the Secretary of the Interior ("Secretary") has approval authority over Indian mineral leases and is required to manage virtually every aspect of Indian mineral leasing activities, from production to processing to collection of royalties. In 1984, the Department, in the course of exercising these duties, adjusted the royalty rate in a Navajo coal lease from an extremely low rate

[2] In addition to uranium, Laguna has timber, sand and gravel, and other natural resources on its reservation, some of which are also subject to the IMLA.

(which the Navajo Nation had been receiving for 20 years) to one reflecting the market rate. The lessee, Peabody Coal Company, appealed the decision, and the Department was on the verge of upholding the decision on appeal. At this point, however, the Department abruptly stopped honoring its obligations. The Secretary met secretly with a close friend whom Peabody had hired to lobby against the pending decision. The Secretary subsequently instructed the Department not to issue the appeal decision, at the same time misleading the Navajo Nation as to the reason for the delay in the appeal. Ultimately, the Navajo Nation was forced to settle for a substantially lower royalty rate. The Secretary approved the renegotiated lease despite the unsupportable rate.

The Government contends that these breaches of its obligations are not compensable, but its position is contrary to this Court's decision in *United States v. Mitchell*, 463 U.S. 206, 213 (1983) ("*Mitchell II*"). The Indian Tucker Act, 28 U.S.C. §1505, provides the necessary waiver of sovereign immunity. In addition, the Secretary's control, supervision and management of Indian mineral leasing under the IMLA and associated statutes and regulations are sufficiently extensive to establish and define the "contours" of the Government's trust responsibilities. 463 U.S. at 224. Under *Mitchell II's* requirements, the Government is liable for the breach of duties falling within those contours.

In carrying out these duties, moreover, the Government was required to maximize the Navajo Nation's revenues from its coal. This requirement stems directly from the IMLA, and it is underscored by the Government's obligations as a trustee, which reinforce the Government's duties under the IMLA to act in the best interests of the tribal beneficiary. In this case, the Government acted in the best interests of the lessee, rather than

of the tribe. A more blatant violation of tribal interests, and of trust, is difficult to imagine.

The Government's utter disregard for its statutory, regulatory, and related trust obligations to the Navajo Nation should not be allowed to go unredressed. Congress recognized that providing Indian tribes access to the courts to enforce their claims against the Government was a matter of national honor, and enacted the Indian Tucker Act, a part of the Indian Claims Commission Act, 25 U.S.C. §§70-70w (repealed), to provide that access. Since then, Congress has repeatedly accepted liability for breaches of the Indian trust responsibility, both in congressional reference cases and in statutes. Congress could have limited its trust responsibilities under the Indian mineral leasing laws, as it has done in some other statutes, but it did not do so. Instead, Congress carefully balanced its trust responsibilities with the goal of fostering tribal self-determination, and in the area of Indian mineral leasing – which requires extensive oversight but brings in much-needed tribal revenues – decided that Government supervision is the paramount concern.

ARGUMENT

I.
THE INDIAN MINERAL LEASING ACT AND ASSOCIATED STATUTES AND REGULATIONS ESTABLISH FIDUCIARY OBLIGATIONS ON THE PART OF THE GOVERNMENT AND MANDATE COMPENSATION FOR THEIR BREACH.

The Government clearly failed to meet its trust obligations under the statutes and regulations relevant to this case: the Court of Federal Claims found that the Government "[met] secretly with parties having interests adverse to those of the trust beneficiary, adopt[ed] the third parties' desired course of action in lieu of action

favorable to the beneficiary, and then misle[ ]d the beneficiary concerning these events," 46 Fed. Cl. at 226, and by doing so "violated the most basic common law fiduciary duties owed to the Navajo Nation," *id.* at 219. The Federal Circuit held that these breaches also were violations of the Government's statutory fiduciary duties, specifically, the statute's "charge to the Secretary to obtain for the Indians the maximum return for their minerals." 263 F.3d at 1332. The Government nevertheless asserts in its brief that, although it "fully accepts the implications of the [trust] relationship and the undertakings that go with it," Pet. Br. at 47, the Government is not required to compensate the Navajo Nation for breach of that trust.

According to the Government, the Navajo Nation must demonstrate that the Government violated a *specific* statutory or regulatory provision "that would clearly mandate the payment of damages," Pet. Br. at 16, both to demonstrate a waiver of sovereign immunity and to make the breach of trust compensable. The Government apparently would concede jurisdiction and liability only in the face of statutory language providing that "the Secretary, in approving or disapproving a tribal coal lease, shall not conspire with lessees against the tribal lessor nor subvert the best interests of the tribe in making a decision regarding its trust resources, and shall be liable in money damages for any breach of that trust and this provision." Pursuant to the holding of this Court in *Mitchell II*, the Government is wrong on both counts.

A. The United States Waived its Sovereign Immunity in the Tucker Acts.

Congress waived the Government's sovereign immunity long ago for claims for money damages based on the Constitution or federal statutes or regulations, when it passed

the Tucker Act in 1887, 28 U.S.C. §1491, and it extended this waiver in 1946 to claims made by Indian tribes (the Indian Tucker Act). As this Court held in *Mitchell II*:

> The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. . . . we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

463 U.S. at 212. The Court explained that in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), "this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity . . . . We conclude that this isolated language should be disregarded." 463 U.S. at 216. This Court further stated that "because the Tucker Act supplies a waiver of immunity . . . , the separate statutes and regulations need not provide a second waiver of sovereign immunity." *Id.* at 218-19.[3]

B. The IMLA and Associated Statutes and Regulations Create a Substantive Right Enforceable Against the United States for Money Damages.

It is a separate question whether the statutes, regulations, treaties and executive orders that form the basis of a claim under the Indian Tucker Act create a compens-

[3]The Indian Tucker Act was not applicable in *Mitchell II* because plaintiffs were Indian allottees, but the reasoning of *Mitchell II* applies with equal, if not greater, force to the waiver of sovereign immunity contained in the Indian Tucker Act, due to the broader scope of claims under that Act. *See* n.8.

able right against the United States. *Id.* at 218. The Government is incorrect in asserting that the Navajo Nation must allege violations of specific mineral leasing statutes and regulations to receive compensation.[4] The Court in *Mitchell II* did not hold that plaintiffs were entitled to damages because they alleged violations of specific timber statutes and regulations, but rather that the timber statutes and regulations as a whole specified the Government's management duties sufficiently so as to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." 463 U.S. at 224. This finding in turn led to the Court's holding that "[b]ecause the statutes and regulations at issue . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Id.* at 226. The mineral leasing statutes and regulations in this case "define the contours" of the Government's trust responsibilities sufficiently to mandate compensation for breach of those responsibilities. Once a compensable trust duty is established, the court looks to the resulting trust relationship, including trust law standards, to fill out the contours of the relevant statutory and regulatory scheme and to gauge the government's performance of its trust duty.

The Court found that the timber statutes and regulations in *Mitchell II* established compensable fiduciary obligations on the part of the Government because the Secretary had a "pervasive role" in timber sales from

[4]In its First Amended Complaint, the Navajo Nation in fact listed in its First Claim for Relief many of the Government's statutory and regulatory authorities and duties, including approval of coal leases, and alleged that the Government violated these duties (C.A. App. at 38-39).

Indian lands, *id.* at 219, the timber regulations "addressed virtually every aspect of forest management," *id.* at 220, and "virtually every stage of the process is under federal control," *id.* at 222.[5] A straightforward application of *Mitchell II* resolves the key question of compensability in this case because the statutes and regulations governing mineral leasing of Indian lands establish the Government's fiduciary obligations just as clearly as the timber statutes in *Mitchell II*, as the Federal Circuit found below. 263 F.3d at 1330. The Navajo Nation discusses in its brief the Government's supervision, management and control in the context of the coal leasing statutes and regulations at issue in this case. *Amici* have direct experience with the Government's management and control of oil, natural gas and uranium leasing of Indian lands, which take place under the same mineral leasing statutes and the same or similar regulatory schemes as coal leasing, and which also are evidence of the Government's "pervasive role" in mineral leasing.

1. The Government Regulates Virtually Every Aspect of Mineral Leasing on Indian Lands.

The IMLA applies to all mineral leasing of Indian lands, including leasing for oil, gas, coal, uranium, and even sand and gravel. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 52 Fed. Cl. 614 (2002); 25 C.F.R. §211.3 (1997). The statute requires

[5] The Court in *Mitchell II* found a compensable breach of the Government's trust obligations for two separate reasons: the Government's management and supervision of Indian resources and the Government's control over those resources. 463 U.S. at 225. There is no need in this case for the Court to define the test with any more precision, because the mineral leasing laws satisfy both tests, just as both were satisfied by the timber statutes and regulations.

the Secretary to approve all mineral leases with Indian tribes, 25 U.S.C. §396a; requires mineral lessees to furnish bonds guaranteeing compliance with the leases "in amounts satisfactory to the Secretary," §396c; and provides that "all operations" under mineral leases "shall be subject to the rules and regulations promulgated by the Secretary," §396d.[6] *Cf. Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1564-65 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (*en banc*), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986) ("*Supron*") (discussing Government's role in Indian mineral leasing). The Department's "rules and regulations" address virtually every aspect of mineral management, just as the timber regulations in *Mitchell II* "addressed virtually every aspect of forest management," 463 U.S. at 220. *See* Commission on Fiscal Accountability of the Nation's Energy Resources (January 1982) ("Linowes Commission Report"), Appendix H (listing BIA trust responsibilities re: mineral leasing), App. 16a-17a.

The Linowes Commission was charged with determining whether obligations under the mineral leasing acts were being adequately enforced and, if not, what corrective action should be taken. Report at 3, App. 8a. Because the Commission found that royalties on mineral resources were being underpaid by hundreds of millions of dollars a year, *id.* at xv, App. 5a, Congress enacted the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§1701-1757 ("FOGRMA"), in order to "clarify, reaffirm, expand, and define the authorities and responsibilities of the Secretary of the Interior to imple-

[6] The IMLA also requires that oil and gas leases be offered for sale "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." 25 U.S.C. §396b.

ment and maintain a royalty management system." 30 U.S.C. §1701(b)(2). *See generally* H.R. Rep. No. 97-859, at 15-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4268. Through FOGRMA, Congress reinforced the Secretary's existing duties under the Mineral Leasing Act of 1920, 30 U.S.C. §§181-263, and the IMLA. For example, the Linowes Commission Report and other investigations resulted in the creation of the Minerals Management Service ("MMS"), a special division of the Department created specifically to enforce the royalty obligations under the mineral leasing acts, *see* S. Rep. No. 97-512, at 10 (1982); *see also* H.R. Rep. No. 97-859 at 16. These investigations also resulted in the development of the Department's Auditing and Financial System ("AFS") and Production, Auditing, and Accounting System ("PAAS"), computerized systems intended to "provide the capability to perform the necessary fiscal and production accounting" for royalty payments. *Id.* at 17. Through FOGRMA, therefore, Congress made the federal royalty management system even more "comprehensive," *id.* at 28, by providing direction as to *how* the Department is to monitor mineral production and collect royalties to fulfill its underlying trust responsibility, which remained unchanged from earlier acts, including the IMLA.

Although FOGRMA directly addresses oil and gas, the additional reporting, recordkeeping and other royalty management that it requires apply also to coal, uranium and other mineral resources. FOGRMA focused on oil and gas because they were the focus of the Linowes Commission investigation, S. Rep. No. 97-512 at 11, 19, 24, but the Linowes Commission Report also stated that "it appears that the general problems of verifying production . . . and designing an effective audit program are common to all minerals," Report at 181, App. 15a. Congress acknowledged the need to investigate royalty

collection from other mineral resources besides oil and gas, S. Rep. No. 97-512 at 11, 19, 24, and specifically directed the Secretary to "study the question of the adequacy of royalty management for coal, uranium and other energy and nonenergy minerals on Federal and Indian lands" and to propose legislation "if the Secretary determines that such legislation is necessary to ensure prompt and proper collection of revenues." FOGRMA §303, codified at 30 U.S.C. §1752, Hist. Note. The study found that there was adequate authority under the existing mineral acts, making additional legislation unnecessary, and recommended that the AFS and PAAS computerized systems developed for oil and gas royalty management be extended to apply to solid minerals royalty management. *See* 51 Fed. Reg. 15,763, 15,764 (Apr. 28, 1986); *see also* 30 U.S.C. §1753(b). MMS subsequently promulgated regulations extending the oil and gas reporting requirements to coal and other solid minerals. 51 Fed. Reg. at 15,764 (placing solid minerals under the AFS); 51 Fed. Reg. 8,168 (Mar. 7, 1986) (placing solid minerals under the PAAS).[7]

Amici have experienced the government's pervasive management, supervision and control of their mineral resources pursuant to this "comprehensive" federal regulatory scheme. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 763 & 767 (1985); *Mitchell II*, 463 U.S. at 222. In the case of Jicarilla, all of the tribe's oil and gas leases are drawn up on standard BIA lease

[7] Certain duties with respect to oil and gas royalties are more detailed than with respect to coal royalties because there is more opportunity for theft and deception with the reporting of oil and gas volumes, quality and processing and other costs than with hard rock minerals. *See, e.g.*, H.R. Rep. No. 97-859 at 17, 33; S. Rep. No. 97-512 at 8.

forms, which specify the royalty rate that Jicarilla will receive for its oil and gas, and are signed by the Bureau of Indian Affairs to denote the Department's approval. The Bureau of Land Management approves permits for production activities, is responsible for inspection and enforcement on the leases and verifies volume reports. 43 C.F.R. §§3161.2-3161.4, 3162.7, 3163 (1985).

Royalties are due from the lessee the month after the month of production, based on the values and volumes that the lessee reports to MMS on forms that MMS provides. These forms specify the transactions that are required to be reported and the deductions that may be taken (for example, for processing costs), according to regulations and policies that are determined by MMS. 30 C.F.R. pts. 210, 218 (1985).

MMS also prescribes the formulas and procedures for lessees to value the oil and gas and to comply with other requirements of the leases. *E.g.*, 30 C.F.R. §§206.-155(a), 206.152(a)(3)(ii), 206.153(a)(3)(ii) (1988). These procedures are contained not only in the mineral leasing regulations, but also in a separate Payor Handbook that MMS publishes and distributes to lessees, one for oil and gas and another for solid minerals.

MMS verifies the accuracy of the reports that the lessees submit. MMS enters this information into its computer database and uses its own personnel to verify the data, conduct investigations and audits of reports, and ensure collection of royalty payments. In the event of noncompliance, MMS issues orders to perform, pursues enforcement actions, and imposes interest and penalties for late payments and noncompliance. 30 C.F.R. §§218.102, 241.20, 241.51 (1985). MMS also handles appeals of orders to perform, noncompliance orders, and other administrative actions. 30 C.F.R. pts. 243 and 290 (1985).

Finally, MMS supervises all payments to the tribe. The lessee either sends its checks to MMS, for subsequent distribution by MMS to the tribe (or Indian allottees), or, in some cases (including Jicarilla's), sends payments directly to the tribe. In either case MMS is responsible for ensuring that the payments are in fact sent and are for the correct amounts, based on the forms that the lessee files with MMS. *See* 25 C.F.R. §211.40 (1997), §211.12 (1985) (payments to be made to MMS); *see also* 30 C.F.R. pts. 217-219 (1985).

Laguna has experienced similar pervasive management and control by the Government with regard to mining and processing of uranium from its Reservation. Many of the regulations cited above, or ones similar to them, apply to uranium as well as to oil and gas. *See generally* 30 C.F.R. pts. 216-218 (2001). In addition, most of the leasing regulations for uranium were the same as for coal during the relevant period, requiring Secretarial approval and regulating each step of the leasing and mining process. *See* 25 C.F.R. pt. 211 (1985). The regulations prescribed a minimum royalty rate that differed from coal, §211.15(a) (1985), but similarly required that royalties be paid to the Government "for the benefit of the lessors." §211.12 (1985). As with coal, the regulations required the submission of detailed exploration and mining plans for approval by the "mining supervisor," the Regional Mining Supervisor of the U.S. Geological Survey. §§216.6-.7 (1985). In short, the Government controlled every aspect of uranium leasing, mining, and royalty collection, often to the complete exclusion of Laguna. In addition, because of uranium's strategic and radioactive nature, national security and environmental concerns regarding uranium added, and add, further layers of regulation regarding uranium pos-

session, production, storage, and transportation. *See, e.g.*, Atomic Energy Act of 1954, 42 U.S.C. §§2011-2297g-4; Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§7901-7942; 10 C.F.R. §40 (2001) (regulating domestic source material).

Amici and other mineral resource tribes simply do not have the resources, expertise or other capabilities to manage and oversee the types of mineral leasing activities described above, a fact that Congress has understood for over a century. Indeed, as this Court noted in *Mitchell II*, "it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place." 463 U.S. at 227. The Government's role in overseeing mineral leasing activities for Jicarilla and Laguna illustrates the degree of federal management and control that takes place under the federal mineral leasing statutes and regulations, confirming that the federal statutory and regulatory scheme "defines the contours" of the Government's fiduciary responsibilities, *id.* at 224, and so creates a compensable right under the holding of *Mitchell II*.

2. The IMLA and Implementing Regulations Require the Government to Maximize Tribal Revenues from Mineral Leasing, and the Trust Relationship Reinforces this Obligation.

The legislative history of the IMLA helps delineate these "statutory contours," confirming that the IMLA was intended "to give the Indians the greatest return from their property." S. Rep. No. 75-985, at 2 (1937); H.R. Rep. No. 75-1872, at 2 (1938); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (IMLA's purpose is to maximize tribal revenues); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985) (IMLA was intended "to ensure that Indians receive the greatest return from their property"). Moreover, when urging enactment of the IMLA, the Secretary singled out the need to revise the coal leasing laws to enable tribes to receive greater revenues. S. Rep. No. 75-985 at 2-3; H.R. Rep. No. 75-1872 at 2-3.

The Government argues that it was not obliged to maximize the Navajo Nation's revenues from the tribe's coal resources, as the IMLA requires, because the authority to adjust the royalty rate came from the lease rather than from the IMLA, and because the adjusted royalty rate that the Government ultimately approved satisfied the minimum rate specified in the Department's regulations. The Government forgets that its obligations under the Indian mineral leasing laws must be determined in light of the "trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225; *accord Seminole Nation v. United States*, 316 U.S. 286, 295 (1942). As a trustee, the Secretary has "moral obligations of the highest responsibility and trust" and his conduct is "judged by the most exacting fiduciary standards." 316 U.S. at 297; *see also* 297 n.12 ("As was well said by Justice Cardozo . . . [citation omitted] . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior"). The IMLA requirement for the Secretary to maximize tribal revenues from mineral leasing is "reinforced" by the Secretary's obligations as trustee, *Mitchell II*, 463 U.S. at 226, which also require the Secretary to act in the best interests of the tribe. The statutory requirement to maximize tribal revenues from mineral leasing therefore extends to the Secretary's interpretation of the leases and regulations, precisely because the Secretary is acting in his fiduciary role, as the court held in *Supron*.

In *Supron*, in ruling on the Secretary's obligations under the Indian mineral leasing laws, the Tenth Circuit held that the Secretary was obliged to interpret the Tribe's leases and the Department's own regulations in the manner that resulted in the greatest benefit to the tribe. The court therefore invalidated the Department's interpretation of its own regulations. The court reached this conclusion despite the fact that the leases specifically referred to the Secretary's discretion, and that the Secretary's interpretation conformed with long-standing policy and industry practice and was not arbitrary or capricious. As Judge Seymour explained in the opinion subsequently adopted by the court *en banc*, "the most significant error the majority makes is its employment of administrative law analysis without considering what role, if any, the Secretary's fiduciary duty should play in a court's examination of his administrative action." 728 F.2d at 1566. Because of the Secretary's fiduciary duties, "the Secretary must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator." *Id.* at 1567.[8]

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), is not to the contrary. The Court in *Cotton Petroleum* did not deny the Secretary's fiduciary duty to maximize tribal revenues in the administration of Indian mineral leases, and in fact referred to its decision in *Montana v. Blackfeet* for that very proposition. 490 U.S. at 179, quoting 471 U.S. at 767, n.5. Instead, the

[8]Moreover, the Indian Tucker Act specifically refers to treaties and executive orders as bases for compensable claims against the Government (in addition to claims cognizable under the Tucker Act), further supporting the principle that the trust relationship informs the Government's duties under the specific statutes claimed.

Court addressed, under a preemption analysis, a state's right to tax oil and gas revenues of non-Indians operating on Indian leases, and specifically found that the state tax did not interfere with the tribe's ability to raise its own tax or with the federal policy of obtaining the maximum return on tribal minerals.

Most often, acting in a tribe's best interest will mean maximizing revenue from a lease. There may be some instances in which cultural, environmental, or other cognizable concerns would allow the Secretary to approve an economic result that is something less than the maximum. For example, the Indian Mineral Development Act of 1982, 25 U.S.C. §§2101-2108, discussed more fully below, expressly recognizes that such factors may be relevant in determining a tribe's best interest, §2103(b), as do the current regulations, 25 C.F.R. §211.1(a) (2002). In the case before the Court, however, there were no countervailing interests *of the Navajo* that would allow the Secretary to obtain less than the best economic result for the Navajo Nation: he was simply pandering to the "best interests" *of Peabody*, the lessee, in blatant violation of the IMLA and the regulations.

In this case, the Secretary violated the requirements of the Indian mineral leasing laws and his trust obligations under those laws. The Secretary did not merely fail to interpret and enforce the Navajo Nation's lease terms so as to maximize the tribe's revenues from its coal, but actively subverted the purpose of the IMLA by meeting secretly with the tribe's lessee and suppressing a decision in the Navajo Nation's favor so as to ensure that the Navajo Nation would *not* receive the full amount of royalties to which it was entitled. Moreover, the Secretary approved the amended leases even though he knew that the

Navajo Nation could have received more for its coal, were it not for his own actions and those of officials in his Department. These breaches of trust in the implementation of the Department's duties under the IMLA surely are specific enough to warrant compensation.[9]

II.

THE GOVERNMENT'S ATTEMPT TO RELEGATE ITS TRUST RESPONSIBILITIES TO A "BACKSTOP" ROLE, IN THE GUISE OF ENCOURAGING TRIBAL SELF-DETERMINATION, IS CONTRARY TO THE EXPRESS INSTRUCTIONS OF CONGRESS.

The IMLA specifically requires the Secretary to approve leases and to establish "rules and regulations" to govern Indian mineral leasing. 25 U.S.C. §§396a, 396d. The Government would turn the Secretary's approval and standard-setting authority into a mere "backstop protection," Pet. Br. at 38, 43, 49, arguing that to do otherwise would conflict with the goal of tribal self-determination. Congress, however, has demonstrated in many statutes and over many decades that it intends the Government to be held accountable for mismanagement of the Indian trust, notwithstanding Congress' goal of increasing tribal self-determination and self-sufficiency. Congress also has shown itself perfectly capable of balancing these two principles as the circumstances require.

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[9] Besides, as the Court in *Mitchell II* points out, 463 U.S. at 226-27, it would not make sense for Congress to require the Government to manage mineral resources under the IMLA in a tribe's best interest and at the same time for the courts to allow the Government to ignore this obligation without there being any consequences.

A. Congress is Aware of and Intentionally Made the Government Liable for Breaches of Its Trust Responsibilities.

The Indian Tucker Act was enacted as part of the larger Indian Claims Commission Act, which Congress intended to be a comprehensive method of dealing with historical and future Indian claims. *See generally*, H.R. Rep. No. 79-1466 (1945), *reprinted in* 1946 U.S.C.C.S. 1347. Charged with hearing Indian claims accruing before August 13, 1946, the Indian Claims Commission had jurisdiction to hear both legal and equitable claims, including claims regarding unfair or dishonorable dealings that would not otherwise be cognizable against the Government. At the same time, the Indian Tucker Act ensured that Indians would have access to the courts for future claims. It is apparent from the statutory scheme and from the legislative history that Congress found it imperative for the United States to abide by its obligations for all Indian claims, including ones arising after passage of the Act:

> [T]he present generation of Indians is entitled to claim the funds that were set aside in trust for them, in place of the lands that they would own today if these transactions had never been consummated. If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.

H.R. Rep. No. 79-1466 at 5.

The principle in this statement is unchanging. As the Committee noted:

> It is sometimes said that those Indians who suffered most under mistaken Federal policy or under the

> maladministration of good policies by weak or faithless public servants have passed on and that there is no reason to compensate their descendants for old injuries. But it was the Federal Government that insisted on dealing with the Indians as continuing corporate entities, and on holding payments on land sales for the benefit of later generations.

Id. Moreover, as numerous government studies and congressional hearings have confirmed, "maladministration" of the Indian trust has continued, and the Indian Tucker Act was intended to address such instances of mismanagement. The instant case demonstrates that "weak or faithless public servants" were not solely a product of the nineteenth and early twentieth centuries. The Government's basic argument – that it has trust obligations but the Navajo Nation is prohibited from obtaining damages for their breach – is thus counter to fundamental provisions of fairness that are a cornerstone of our courts and political system and that drove the passage of the Indian Tucker Act.

Congress' intent that the Government be liable for breach of its trust responsibilities is confirmed by congressional reference cases, 28 U.S.C. §§1492, 2509. Congressional reference cases are private bills referred by Congress to the Court of Federal Claims (or its predecessor courts) for a recommendation on the merits. Absent other direction from Congress, the court is charged with determining whether a claim is legal or equitable, or would constitute a gratuity. 28 U.S.C. §2509(c).

The court is often asked to consider claims that would have been cognizable but for the statute of limitations. In the Indian trust claim context, this procedural posture is significant because it shows that Congress is willing to award damages based on a legal analysis by the court that, but for the limitations issue, is identical to that

otherwise applied by the courts, including this Court in *Mitchell II*. A prime example is *Menominee Indian Tribe of Wisconsin v. United States* ("*Menominee I*"), 39 Fed. Cl. 441, 456-57 (1997).

The Menominee Tribe was chosen for early termination during the era in the 1950s and early 1960s when cost-saving measures led Congress to terminate the trust relationship with some tribes; the Menominee Termination Act was passed in 1954, and the tribe was terminated in 1961. *See Menominee I, id.* at 450-54. Congress ultimately recognized that termination had left the tribe (and other tribes) without the resources or experience to govern themselves; it restored the trust relationship with the Menominee Tribe in 1973. 25 U.S.C. §§903-903f. While terminated, the tribe brought suit against the Government in the United States Court of Claims, alleging that the Government had mismanaged the tribe's sawmill, trust funds, timber, and other resources in the years prior to termination and that the termination itself was improper. *Menominee I*, 39 Fed. Cl. at 444-47. The sawmill mismanagement claim and portions of the forest mismanagement claim were dismissed based on the statute of limitations.[10] *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722 (Fed. Cir. 1984). The tribe was left with no recovery.

Congress reacted in 1993 with the congressional reference. Based on *Mitchell II*, the Court of Federal Claims concluded that "the web of statutes and treaties created an obligation in BIA to operate and maintain the mill for the benefit of the Tribe *as a fiduciary would*." *Men-*

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[10]The court dismissed the wrongful termination claim and other portions of the forest mismanagement claim because recovery would have required finding that a constitutional act of Congress was a cognizable legal wrong. *See* 39 Fed. Cl. at 444-46.

ominee I, 39 Fed. Cl. at 462-63 (emphasis added).[11] The tribe and the Department of Justice subsequently agreed to a settlement of all claims, which the court approved. *Menominee Indian Tribe of Wisconsin v. United States* ("*Menominee II*"), 41 Fed. Cl. 525, 527 (1998). Congress approved the settlement in its entirety, expressly recognizing that a portion of the damages was based on "the mismanagement by the United States of assets of the . . . Tribe held in trust by the United States before April 30, 1961, the effective date of termination of Federal supervision of the . . . Tribe." Act of Aug. 17, 1999, Pub. L. 106-54, §3(a)(2), 113 Stat. 398. Congress thus both recognized the Government's potential liability for the Indian trust and also made clear that the Government should not attempt to evade liability.

B. Congress Knows How to Limit the Government's Trust Responsibility, and Did Not Do So in the IMLA.

Under *Mitchell II* and the Indian Tucker Act, what matters is whether *Congress* intended the Government to be liable for breach of trust under any particular treaty or statute.[12] Congress' intent that the Government be liable for mismanagement in Indian mineral leasing is clearly expressed in the IMLA, as discussed in Part I above. In other statutes, Congress has made clear that it knows how to limit the Government's liability when it

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[11] The court reiterated the earlier conclusion that there could be no recovery for the wrongful termination claim. *Menominee I*, 39 Fed. Cl. at 459-62.

[12] Under proper circumstances, liability can also be created under the Indian Tucker Act by the executive through lawful regulations and executive orders.

sees fit, and the fact that Congress did not do so in the IMLA is further evidence of the Government's comprehensive trust responsibilities under that act.

For example, in 25 U.S.C. §415, which addresses leasing of Indian lands in restricted ownership, Congress limited the liability of the Secretary when the Navajo Nation approves *non-mineral* leases. Mineral leases continue to require Secretarial approval. The logical implication of this juxtaposition is that the Secretary remains liable for breaches of trust relating to mineral leases, an understandable decision in light of the extensive resources that proper supervision of mineral leases requires, as discussed in Part I, *supra*.

Section 117 of Title 25 allows tribes to make per capita distributions to tribal members directly from tribal accounts, rather than having those payments issued by the Government as had been required previously. In §117c, Congress eliminated the Government's liability for such distributions as long as the Secretary approves the distribution plan in accordance with reasonable standards established by regulation. Other statutes eliminate the Government's liability if a tribe elects to take funds out of trust and have them managed by a third party. *E.g.*, 25 U.S.C. §4022 (allowing tribes to withdraw funds from trust, after which "any trust responsibility or liability of the United States with respect to such funds shall cease"); 25 U.S.C. §941i(c) (allowing Catawba Indian Tribe to withdraw certain settlement funds from trust pursuant to management plan approved by the Secretary).

Congress also is aware of how to limit the Government's liability for land and natural resources, as it did in 25 U.S.C. §1754, regarding settlement of Connecticut Indian land claims. Subsection (b)(7) provides that

lands within a specific settlement area "shall be held in trust by the United States for the benefit of the Tribe." In contrast, subsection (b)(8) provides:

> Land or natural resources acquired under this subsection which are located *outside* of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and *the United States shall have no further trust responsibility with respect to such land and natural resources.*

(emphasis added).

Similarly, 25 U.S.C. §941j*(l)*, part of the codified settlement with the Catawba Indian Tribe, allows the tribe to lease its lands "with or without approval of the Secretary." Significantly, Congress stated:

> With regard to any lease of Reservation lands not approved by the Secretary, the Secretary shall be exculpated by the Tribe from any liability arising out of any loss incurred by the Tribe as a result of the unapproved lease.

Id. The negative implication is unmistakable: Congress' assumption was that if the Secretary exercises his approval authority, the Secretary is not released from subsequent liability resulting from that approval.

These statutes show that Congress is fully capable of limiting or even terminating the Government's trust responsibility when it chooses, and the fact that Congress did not do so in the IMLA is telling. They also show that Secretarial approval is automatically associated with liability. Accordingly, if Congress wishes to exculpate the Government even where some form of Secretarial approval is required, it does so explicitly, *e.g.*, 25 U.S.C. §941i(c). *See also* 25 U.S.C. §§415(e)(5), 941j*(l)*

(exculpating the United States when a tribe is allowed to bypass Secretarial approval). Congress did not exculpate the Government in the IMLA, and so liability for the Government's comprehensive trust responsibilities remains.

C. Congress Balances the Trust Responsibility with the Goal of Tribal Self-Determination as Circumstances Require.

Congress also knows how to balance the Government's trust responsibilities with the goal of encouraging tribal self-determination, despite the Government's contentions that the two principles are in conflict. In fact, the IMLA provides an early example of Congress' recognition of tribal governments after the allotment era: it gives tribes the right to enter into mineral leases. However, the statute makes the Secretary responsible for approving those leases to ensure that they are in the best interests of the tribe, and requires the Secretary to oversee and manage those leases in the comprehensive manner described in Part I, above.[13]

When it became apparent that the Secretary was failing to perform his duties under the IMLA, as the Linowes Commission and other investigations concluded,

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[13] The Government gives the impression that the Indian Reorganization Act of 1934, 25 U.S.C. §§461-492, provided tribes with total control over their own concerns. While the IRA was certainly a significant shift in federal Indian policy and signaled the return to a modicum of respect for tribal institutions, it retained a significant role for the United States as trustee. For example, one of the statutes giving rise to liability in *Mitchell II* was in fact part of the IRA. *See* 25 U.S.C. §466. The IRA did not end the trust responsibility; just the opposite, it affirmed that Congress intended to take that responsibility seriously even after the reconstitution of tribal governments.

Congress followed two different courses of addressing the problem: it enacted FOGRMA, which if anything increased the Secretary's role over mineral leasing, and the same year (1982) it enacted the IMDA, which gave tribes the opportunity to exercise more independence in the area. The IMDA is a prime example of Congress' balancing of the trust responsibility with tribal self-determination.

Despite leaving much authority to tribes, the IMDA specifically requires that, before approving a minerals agreement, the Secretary "shall determine if it is in the best interest of the Indian tribe or of any individual Indian." 25 U.S.C. §2103(b). At the Department's insistence, *see* H.R. Rep. No. 97-746, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1938, a provision was added to the IMDA regarding the Secretary's liability:

> **Nonliability of United States; continuing obligations.**
> Where the Secretary has approved a Minerals Agreement *in compliance with the provisions of this chapter* and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement: *Provided*, That the *Secretary shall continue to have a trust obligation to ensure* that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement: *Provided further*, That nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.

25 U.S.C. §2103(e) (emphasis added). The calculus is simple: if the Secretary approves a minerals agreement in compliance with the other provisions of IMDA, the tribe assumes any business risk. However, for the Secretary to approve an agreement "in compliance with the provisions of this chapter" requires the Secretary to find that the agreement is in the "best interest" of the tribe in light of the factors listed in §2103(b), and the Secretary is liable if he does not make a best interest determination. The two provisos spelling out the continued obligations of the Secretary highlight that the "nonliability of the United States" is limited to risks that the tribe knowingly undertakes, and that the Secretary remains liable for failure to review and enforce the agreement and for other trust duties.

The House committee explained that the hold harmless language in the Act "simply restates the law as it exists today," H.R. Rep. No. 97-746, at 7 (1982), in other words, the law as it exists under the IMLA. In addition, the Committee noted:

> Representatives of concerned Indian tribes were alarmed at the Administration's recommendation and viewed it as a total release of the United States' responsibility as trustee. While this was not the case, the Committee sought to allay their concerns by adding the proviso contained in subsection(b) [now in 25 U.S.C. §2103(e)]. This, too, simply restates the existing law. The United States cannot be held to be a guarantor of the business enterprises of an Indian tribe nor an insuror against business losses from the implementation of an agreement nor against acts of God. Nevertheless, the Secretary retains an obligation to see that the non-Indian parties do not violate or vary the terms of the agreement to the detriment of the Indian parties. The

> Committee has had recent examples of this in the allegations of loss of royalties under Federal and tribal oil and gas leases because of inadequate monitoring and review of company activities and reporting.

H.R. Rep. No. 97-746 at 8. There is a legally dispositive difference between the Secretary being an insurer against risks outside of the Secretary's control and the Secretary taking actions that guarantee that a tribe will receive less than it could otherwise receive for its resources. The latter is antithetical to a trustee's role and cannot in any way be interpreted as supporting the best interest of the tribe.

The Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§450-458bbb-2, is perhaps Congress' most significant effort to encourage tribal self-determination, and it too shows congressional intent to reaffirm the trust relationship. It allows a tribe to contract or compact with the Government to take over the provision of program services otherwise provided by the Government. The funding available to the Government for the program is made available to the tribe. Despite this considerable transfer of day-to-day control to tribes, Congress "declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people" and specified that "[n]othing in this subchapter shall be construed as . . . authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. §§450a(b), 450n; *see also* 25 U.S.C. §458cc(b)-(9), 458aaa-14(b) (similar reservations and protections of existing trust responsibility); 25 C.F.R. §1000.302 (2002) (reassumption of a program if tribe disregards "Federal trust standards").

Tribal self-sufficiency is a stated goal of Congress, *see, e.g.*, 25 U.S.C. §§450a, 2702(1), and the ideal in Indian country. Encouraging the development of tribal expertise and experience to manage complex affairs is an essential step in attaining that goal. But the continuing trusteeship of the United States is also essential. The United States has resources – human, logistical, and financial – that even the largest and richest tribes cannot possibly match. If tribes are to become self-sufficient, it is also imperative that they receive the maximum amount possible for their resources (which in the instant case were non-renewable). Given the paltry tax base of most tribes, self-sufficiency can never come about without adequate capitalization. For a significant number of tribes, natural resource development is the only realistic source of capital.

The Government's trust duties and tribal self-determination are complementary in many instances, and Congress has recognized that fact by preserving the former while encouraging the latter. Where Congress has chosen, it has limited the trust responsibility when greater control is transferred to a tribe. But as the brief survey of statutes above illustrates, such exculpation follows only when the Secretary is eliminated from the decision-making and management process. The Secretary's continuing oversight and management role in mineral leasing precludes any inference that Congress meant to absolve the Secretary of liability for breach of trust responsibilities. In fact, the Secretary's own regulations underscore the legal significance of a secretarial approval requirement in a statutory and regulatory regime. As 25 C.F.R. §211.29 (1985) states: "The [IMLA] regulations in this part . . . shall apply to leases made by organized tribes *if the validity of the lease depends upon the approval of the Secretary of the Inter-*

ior." *Id.* (emphasis added). In other words, the applicability of the entire comprehensive regulatory regime in Part 211 hinges on whether Secretarial approval of a lease is required.[14] Despite the Government's attempts to diminish the importance of this so-called "backstop protection," Secretarial approval is the pivotal legal requirement in triggering detailed federal trust oversight under the IMLA regulations and in many of the statutes discussed above. While the Executive Branch may fear liability for its failures, Congress and this Court have achieved a proper balance regarding the Indian trust. A finding of a compensable breach in this case will reaffirm that the United States, specifically the Secretary, must administer the Indian mineral trust honestly and with a tribe's best interest as the guiding principle.

CONCLUSION

The decision of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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October 9, 2002

[14] Under the Indian Reorganization Act, tribal law – most likely a tribal constitution – can sometimes preclude the application of federal regulations, as 25 C.F.R. § 211.29 recognizes.

APPENDIX

REPORT OF THE COMMISSION

FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES

[SEAL]

David F. Linowes
Chairman

Michel T. Halbouty

Mary Gardiner Jones

Charles J. Mankin

Elmer B. Staats
Commissioners

JANUARY 1982

* * *

PREFACE

The Commission on Fiscal Accountability of the Nation's Energy Resources has completed the tasks established for it in its Charter of July 8, 1981. Those tasks were:

- To examine the allegations of massive irregularities in royalties on the Nation's energy resources which are owed to the Federal government, Indian tribes, and States;
- To investigate the allegations of theft of oil from Federal and Indian lands; and
- To make recommendations for improving fiscal accountability of the Nation's energy resources.

The Commission's findings and recommendations are set forth in this report. Each of the recommendations was adopted unanimously by the Commission.

The Commission could not have completed its work on these complex and urgent matters in a timely fashion without the active cooperation of a great many people and institutions. Throughout the life of the Commission, our activities were coordinated with the President's Council on Integrity and Efficiency in Government. We received unstinting help from the Department of the Interior; from other government agencies, such as the General Accounting Office, the Internal Revenue Service, and the Office of Management and Budget; as well as from Members of Congress and their staffs.

The Commission was also aided immeasurably by States, Indian tribes, the oil and gas industry, and private citizens who appeared before the Commission at five sets of comprehensive public hearings. Many of those testifying provided followup assistance as well.

We are also indebted to scores of other individuals who gave their time and professional expertise. We particularly want to recognize the competent contributions and unfailing assistance of William L. Kendig, Director of Financial Management of the Department of the Interior, and Wiley W. Horsley, Jr. and Richard E. Powers of that office. Milton J. Socolar, John F. Simonette, Jeffrey C. Steinhoff, and Darby W. Smith of the General Accounting Office were most responsive to the Commission's needs. Dallas L. Peck, Doyle G. Frederick, R. Michael Gall, and J. Ronald Jones of the U.S. Geological Survey all cooperated generously and graciously.

Our staff, led by its Executive Director, Charles L. Elkins, performed with unusual devotion to our demanding schedule. Our sincere appreciation to each of them.

Finally, the Commission wishes to acknowledge that much of its effort rests on a body of work on oil and gas royalty management completed over the last twenty years by the General Accounting Office, the Department of the Interior, and various Congressional committees.

The Commission's charge broadly covers the Nation's energy resources, which include hard mineral energy resources such as coal and uranium as well as oil and gas. We are aware of problems in the management of coal and uranium royalties, and these are briefly addressed in Chapter Eight of this report. But for the present and the near future, oil and gas are dominant, providing 97 percent of the royalties from Federal and Indian energy resources. For this reason, this report essentially is focused on oil and gas.

The Commission has viewed its efforts as contributing to the prudent management of the country's energy resources, and to stopping any loss of revenues rightly due

to the Federal government, the States, and Indians. Equally, we recognize that democratic institutions rest on a foundation of faith in the competence and accountability of government. We believe that the measures recommended by this Commission can help to strengthen that faith.

David F. Linowes
Chairman

SUMMARY

Management of royalties for the Nation's energy resources has been a failure for more than 20 years. Because the Federal government has not adequately managed this multibillion dollar enterprise, the oil and gas industry is not paying all the royalties it rightly owes.

The government's royalty recordkeeping for Federal and Indian oil and gas leases is in disarray. For this reason, the exact amount of underpayment is unknown. The results of individual audits, which have often uncovered large underpayments, suggests that hundreds of millions of dollars due the U.S. Treasury, the States, and Indian tribes are going uncollected every year.

In addition, oil thefts are occurring on Federal and Indian leases. The extent of theft and the amount of royalty losses from theft are unknown, but it is well-documented that security at many Federal and Indian lease sites is lax and is an open invitation to theft.

The Nation can no longer afford mismanagement of royalties for its energy resources. The stakes are too high. With the rapid escalation of energy prices, oil and gas royalties have risen from less than $500 million in 1971 to more than $4 billion in 1981.

The government's royalty management system needs a thorough overhaul. This report of the Commission on Fiscal Accountability of the Nation's Energy Resources details 60 specific recommendations (listed in Chapter Nine of the report) for revising and rebuilding the system. Underlying these recommendations are some fundamental conclusions the Commission reached in the course of its intensive inquiry:

- *The government's royalty management systems must have qualified managers.* The scientifically oriented Geological Survey, which now manages royalties, has never been able to supply the active, sophisticated management that is needed. It is largely for this reason that the Commission recommends removing the royalty management function from the Geological Survey. In a separate office with a clearly defined mission, royalty management could attract managers with the training and experience required.
- *The Federal government should work more closely with States and Indian tribes.* In fulfilling its royalty management responsibilities, it should cooperate much more than it has in the past with States and Indian tribes, sharing both information and specific tasks, such as auditing and site inspection.
- *The Federal government should perform an oversight role.* It must not waste its limited resources on tasks that are industry's responsibility. In managing royalty collection, it should not remain mired in bookkeeping details that rightly belong to the lessee. Instead, it should develop systematic, independent cross checks of royalties paid and reports submitted by companies, and it should impose meaningful penalties for false statements or gross errors. In helping to prevent theft, the government should not issue detailed, rigid regulations for security of lease sites. Rather, it should monitor the companies' performances in carrying out their own site security plans and should penalize violations.

- *The oil and gas industry should carry out its obligation, as lessee, to pay royalties in full and on time.* The industry, not the govenment, has primary responsibility for the detailed record-keeping needed to assure that all royalties are paid. The industry also has the obligation to assure the security of lease sites. The industry, not the government, is best suited to develop effective site security plans, subject to the government's minimum standards.

If there is one concept that sums up the Commission's overall approach, it is accountability. Oil and gas companies must be held accountable for the obligations they undertake when they lease Federal and Indian lands for minerals production. The Federal government must be held accountable for fulfilling a public trust, that is, assuring that royalties for the Nation's energy resources are fully and fairly collected on behalf of the people of the United States.

The Federal government has not fulfilled this trust in the past 20 years. It is now taking steps to better its performance. Complex and demanding as the task may be, it is achievable if the internal controls, site security standards, and sanctions recommended here are made part of an improved royalty management system.

CHAPTER ONE

INTRODUCTION

In 1981, the Federal government collected more than $4 billion in royalties on oil and gas produced on Federal and Indian lands. As energy prices rise and the leasing of Federal lands accelerates, royalties will multiply.

Serious questions have been raised concerning the management of these royalty collections:

- Is the Department of the Interior collecting all of the royalties which are owed by those who lease Federal and Indian lands for energy resource development?
- Are Federal and Indian lease sites adequately protected to prevent the theft of oil?
- If not, what corrective actions should be taken?

These, in essence, were the questions which the Commission on Fiscal Accountability of the Nation's Energy Resources was charged with answering.

In particular, the Commission was asked to investigate allegations of underpayment of royaties due to Federal and Indian landowners and the theft of oil from these lands, and to recommend changes to resolve problems which may exist. This report presents the Commission's findings and recommendations for corrective actions.

Underpayment of royalties is a longstanding concern, emerging repeatedly in government reports and audits over the last two decades. The General Accounting Office, the Interior Department's Office of Inspector General (formerly the Office of Audit and Investigation), the U.S. Geological Survey, and witnesses before Congressional committees and this Commission all have documented serious defects in the governments's royalty collection system which have resulted in losses of revenues. More recently, outright physical theft of oil from Federal and Indian lands has come to light, raising serious doubts about the adequacy of site security measures.

Many aspects of royalty management are inherently difficult: complex price controls, complications introduced by the Windfall Profit Tax, division of responsibilities for lease management among various agencies, rapid growth in the production and value of the minerals, and an increasing number of widely scattered leases. The Commission recognizes that, given these complexities, no agency could perform perfectly. Nevertheless, major improvements in the Federal royalty management program should and can be undertaken.

Budget cuts and belt tightening by the Federal government underscore the importance of proper collection of royalties. While there is no way to measure accurately the revenue losses due to undercollection of royalties, some estimates place the loss as high as several hundred million dollars a year.

Effective collection of royalties has always been, and continues to be, an important matter of equity and good government. But the escalation of oil and gas prices has sharpened the issue in a very practical way. The barrel of oil that cost less than $3 in 1971 is now selling for more than $30. Federal oil and gas royalties have increased in much the same proportions, from less than half a billion dollars in fiscal year 1971 to an estimated $5 billion in fiscal year 1982. The Department of the Interior estimates that oil and gas and other mineral royalties

could amount to more than $8 billion in fiscal 1984 and well over $14 billion in 1990.*

At the same time that high oil prices have raised the value of the Federal and Indian resources, they have also increased the temptations for theft. For example, a few minutes spent loading a 100-barrel tank truck at an unsecured lease site could be worth as much as $3,000 to a thief. The rewards for improper reporting of sales (or "paper theft") can be even higher, with less effort and risk on the part of the thief.

THE CONCERNS OF STATES AND INDIANS

States and Indian landowners have an important stake in the full and correct payment of royalties. States share half the royalties for mineral resources produced on Federal lands within their borders (Alaska receives approximately 90 percent). In fiscal year 1980, the States' share of royalties for onshore leases was $315 million; Wyoming, the biggest beneficiary, collected $115 million. Twenty-three States now share royalties from Federal onshore lands, using the money to provide essential government services.

Moreover, the States benefit from the $900 million Federal Land and Water Conservation Fund. This fund is financed each year by a portion of Federal revenues from offshore oil and gas. The States receive grants from the fund to cover part of the cost of acquiring and developing recreation projects.

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*On January 5, 1982, the U.S. Geological Survey revised downward its projections of future royalties, from $6.5 billion in 1982 to $5 billion, and from $22 billion in 1990 to $14.6 billion. This report uses the newly revised forecasts. The figures are for gross royalties, which include the Windfall Profit Tax.

Indian tribes and individual Indian landowners (allottees) receive 100 percent of the royalties derived from mineral resources leases on their lands. These minerals, especially oil and gas, are today the most valuable property on Indian trust lands, and are highly significant sources of income to their owners. In fiscal year 1980, the Bureau of Indian Affairs reported that 33 tribes received $164 million in oil and gas revenues and $33 million in revenues for other minerals (such as coal, copper and uranium). By contrast, all of the 300 federally recognized tribes received $117 million for forestry rights and $55 million for grazing and other surface rights in 1980.

The Federal government shares the concerns of Indian landowners in the prudent management of their energy resources. Moreover, the Federal government has a special responsibility as trustee for proper management of Indian natural resources. However, concern about underpayment of royalties and oil theft has risen sufficiently among Indian landowners that several tribes have engaged their own investigators, technicians, and lawyers to protect what they consider to be their rightful claims.

The States, too, are anxious about the adequacy of the Federal government's royalty management effort and what the implications are for their share of the revenues. California has brought suit against the Federal government, demanding an accounting of royalties back to 1920, and the establishment of a more reliable royalty management system. Ten other States – Colorado, Arizona, Utah, New Mexico, Idaho, North Dakota, South Dakota, Montana, Nevada and Washington – have supported California as friends of the court.

Committees and Members of the Congress have been expressing concern. Within the last year, five Congressional committees and subcommittees probed the related issues of underpayment of royalties and oil theft.* The news media – press, radio and television – have also aired the allegations.

WHO HAS THE RESPONSIBILITY?

In the Mineral Leasing Act of 1920, the Congress assigned the responsibility of managing the development of mineral resources on public lands to the Department of the Interior. The Bureau of Indian Affairs (BIA) and the Bureau of Land Management (BLM) are in charge of leasing these lands for exploration and development. The U.S. Geological Survey (USGS) – specifically, the Survey's Conservation Division – oversees actual operations on the lease site. With regard to royalty management for oil and gas, the Conservation Division:

- Obtains reports on lease production, sales, and royalties paid;
- Collects and records royalties paid and due; and
- Monitors the lessee's activities for site security and production verification.

The funds are placed in U.S. Treasury accounts and then are disbursed by the BIA and BLM to the Indians and the States. The Federal share remains in the U.S. Treasury.

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*Senate Select Committee on Indian Affairs; Senate Energy and Natural Resources Committee; House Committee on Government Operations, Subcommittee on Commerce, Consumer and Monetary Affairs; House Committee on Interior and Insular Affairs, Subcommittee on Mines and Mining, and Subcommittee on Oversight and Investigations.

HOW THIS REPORT IS ORGANIZED

Chapter Two of the report outlines the current problems of royalty collection and theft which have aroused government and public concern, and which led to the establishment of this Commission. The chapter is based upon the record before the Commission, including five sets of hearings with testimony from 129 witnesses; several onsite inspections; and reviews of major reports and additional material from the General Accounting Office, audits and other reports by the Department of the Interior, and hearings and reports by Congressional committees.

The remaining chapters deal with the Commission's findings and recommendations:

Chapter Three:	Internal Controls
Chapter Four:	Site Security
Chapter Five:	Enforcement
Chapter Six:	States and Indian Tribes
Chapter Seven:	Organizational Issues
Chapter Eight:	New Approaches to Royalty Management
Chapter Nine:	Summary of Recommendations

These chapters weigh the testimony of the many knowledgeable people who appeared before the Commission and consider proposals made in previous reports. They draw on the valuable advice of States and Indian tribes which have had experience in royalty management.

Each of the chapters presents recommendations for actions by the Executive Branch and the Congress to assure proper accountability of the management of the Nation's energy resources.

* * *

A NOTE ON SOLID ENERGY MINERALS

The Commission directed its inquiry almost entirely to management of royalties for oil and gas produced from Federal and Indian lands. As production of other energy minerals – coal, uranium, possibly oil shale – increases, royalty management for these minerals also will take on added significance. In 1980, royalties for the solid energy minerals produced from Federal and Indian lands amounted to $49 million – $40 million for coal, $9 million for uranium, and a negligible amount from oil shale. This compares with $2.6 billion in oil and gas royalties for the same year.

Depending on overall market demand and competition from non-Federal mines, coal production from Federal and Indian leases is expected to increase from 93 million tons in 1980 to 268 million tons by 1990. The anticipated rise in production could significantly increase Federal and Indian coal royalties. Coal production of 93 million tons on Federal and Indian leases yielded royalties of $40 million; 268 million tons is expected to produce royalties of at least $115 million (assuming no increase in coal prices.)

Because the Federal government owns 60 percent of the coal reserves in Western States, those States' share of Federal coal royalties could be a significant source of income. Important Federally owned coal reserves are located in Colorado, Montana, New Mexico, North Dakota, Oklahome, Utah and Wyoming. Just how significant coal may prove to be as a source of royalty income to the States and coal owning Indian tribes depends on the future significance of coal based synfuels and coal exports.

The Commission briefly reviewed some of the problems of royalty management for solid energy minerals. From

this preliminary review, it appears that the general problems of verifying production, determining fair market value, and designing an effective audit program are common to all minerals. The Commission believes that many of the recommendations of this report, which were formulated primarily with oil and gas royalties in mind, may be applicable as well to managing royalties from the solid energy minerals.

The managers of the Federal royalty program should carefully study the solid energy minerals royalty area and assure itself that the changes being designed into the royalty management system are compatible with the solid energy minerals. The Commission saw no evidence that such an in-depth study has occurred. It should be done before the final system design is completed.

* * *

[APPENDIX H]

RESPONSIBILITIES OF THE BUREAU OF INDIAN AFFAIRS IN THE MINERALS MANAGEMENT PROCESS

The Bureau of Indian Affairs administers the Secretary's trust responsibilities with respect to the development and production of Indian minerals held in trust or in restricted status. These responsibilities are accepted to be an obligation to protect the resources and to obtain the highest remuneration for the sale of them. Specifically, the Bureau is responsible for:

- Processing and approving all exploratory permits, in consultation with the tribe;
- Advising the tribe of tract or location nominations by industry and providing any technical assistance requested by the tribe;
- Determining and including special terms in the lease prior to advertisement, in consultation with the tribe.
- Preparing competitive advertisement after authorization by tribal resolution;
- Complying with requirements of the National Environmental Policy Act of 1969 (preparation of Environmental Assessment or Environmental Impact Statement, done in concert with tribe and the USGS);
- Advertising for sealed bids (sometimes including oral auction);
- Holding lease sale and open bids;
- Requesting assistance of the USGS in determining adequacy of high bids, as necessary;

- Presenting high bids to the tribe for acceptance or rejection;
- Receiving tribal resolution indicating acceptance or rejection of successful bidders;
- Notifying successful bidders;
- Assisting bidder in completing lease, if necessary;
- Submitting completed lease form, executed by bidder, to tribe for execution;
- After tribal execution, approving lease, (the Secretary's Authority is delegated to Bureau).
- Collecting, accounting, and distributing bonus and rental income prior to production;
- Making distribution of royalty payment after it is transmitted from USGS royalty management office, once production begins;
- Taking remedial lease compliance actions, either individually or with technical advice from USGS;
- Canceling lease, if necssary; and
- Processing final administrative termination of lease after site inspection approval by the USGS.

* * *